(22,492)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 211.

THE TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

C. C. PRATER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 3, 1912.

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a *Transcript of Record.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 2084.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
versus
C. C. PRATER, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Texas.

[Original Record Filed May 20, 1910.]

U. S. Circuit Court of Appeals, filed Jul- 16, 1910. Charles H. Lednum, Clerk.

b UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the First Monday of November, 1910, at Fort Worth, Texas, and on the Third Monday of November, 1910, at New Orleans, Louisiana, Before the Honorable Don A. Pardee, the Honorable A. P. McCormick and the Honorable David D. Shelby, Circuit Judges.

No. 2084.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
versus
C. C. PRATER, Defendant in Error.

Be it remembered, That heretofore to wit: on the 20th day of May, 1910, a transcript of the record of the above styled cause from the Circuit Court of the United States for the Northern District of Texas, was filed in the office of the Clerk of said United States Circuit Court of Appeals for the Fifth Circuit, in the words and figures following, to-wit:

1 **Caption.**

Be it remembered, That — a term of the Circuit Court of the United States, in the Fifth Circuit and in and for the Northern District of Texas, begun and holden at Fort Worth, Texas, on the 1st day of November, A. D. 1909, and which term adjourned on the 7th day of January, A. D. 1910, the Honorable Edward R. Meek, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to-wit:

No. 498.

C. C. PRATOR
versus
TEXAS AND PACIFIC RAILWAY COMPANY.

Transcript from State Court.

Filed Nov. 2, 1908.

Caption.

THE STATE OF TEXAS,
County of Tarrant:

Transcript of the Record from the District Court (67th Judicial District) of Tarrant County to the Circuit Court of the United States in and for the Northern District of Texas.

No. 27463.

C. C. PRATOR
vs.
THE TEXAS & PACIFIC RAILWAY CO.

2 *Original Petition.*

In the District Court of said County.

THE STATE OF TEXAS,
County of Tarrant:

To said Honorable Court:

Your petitioner, C. C. Prator, plaintiff, complaining of the Texas & Pacific Railway Company, defendant, respectively shows to your Honor that plaintiff resides in Tarrant County, Texas, and that defendant is a corporation duly incorporated and has an office and an agent in said State and County.

That heretofer, to-wit, on the 2nd day of May, 1908, plaintiff was in the service of defendant as an engineer in charge of an engine and freight train going east on defendant's line of railway, defendant being a railway company, near Thurber Junction, a station on said line of railway. That another freight train belonging to defendant was ahead of plaintiff's train and going in same direction on said line of railway, and through the negligence of defendant's agents and servants in charge of same said last named train stopped near Thurber Junction of the main track of said railway, it being then and there in the night time, and through such negligence of defendant and its agents and servants in charge of said train, plaintiff, without fault on his part collided the engine of his train and the rear end or caboose of said other train, and in said collision plaintiff was injured as hereinafter more fully described.

That defendant's negligence consisted among other things in this: that under defendant's rules promulgated for the safety of its trains and its employees, it was the duty of the conductor in charge of said train so stopped on the track of defendant and with which plaintiff's engine so collided, when said train was so stopped to send a flag man back to said *said* railway track in the rear of said train in the direction plaintiff was coming with his train, at least twenty telegraph poles from the train so stopped and place one torpedo on a rail of said track and then place one torpedo on the same rail at a further distance of ten telegraph poles from the first torpedo, and then take a position about midway between the two torpedoes, to stop approaching trains with red signals. That defendant and said conductor wholly failed to discharge this duty in every respect.

3 Plaintiff further alleges that it was the duty of those in charge of said train with which plaintiff's engine collided to have hanging on the rear end or caboose of said train red lights and that defendant and those in charge of said train wholly failed to discharge this duty, said caboose not having any lights of any character hanging on same when plaintiff's engine so collided with it.

That it was very dark at said point of collision and that said train with which plaintiff's engine so collided was stopped on the main track of said railway and not at a regular stopping place for either passenger or freight trains, and that plaintiff, although using due care for own safety, did not discover said train in time to avoid said collision.

Plaintiff further alleges that said train with which his engine so collided, without having any signal lights on the rear end thereof and without said flagman having been sent back as aforesaid, and without said torpedoes having been placed on the rail as aforesaid, *and* was running back towards plaintiff's said train when his engine so collided with said caboose, and that it was negligence on defendant's part for said train to be so moved on said track at said time.

Plaintiff alleges that when his engine so collided with said caboose that he had reached the iron steps of his engine in an endeavor to escape from same, and that he was by said collision violently thrown down, the lower part of his spinal column striking said iron steps or some other hard substance, and violently thrown from there to the ground and seriously injured in and about his spinal column, back, hips and nervous system, and was internally injured. That at the time plaintiff was so injured he was a strong, able-bodied man, earning and capable of earning from $150.00 to $200.00 per month, and by reason of said injuries he is and will be permanently disabled and incapable of laboring or earning any money.

That by reason of said injuries he has suffered and will in the future suffer great mental and physical pain and anguish from said injuries, they in their nature being permanent.

Plaintiff further alleges that he has paid out and incurred to physicians and for medicines for the necessary treatment of his said injuries the sum of, to-wit, $200.00, and that he believes that it will be necessary for him to have said injuries so treated in the future,

he not having recovered from same, and that he will so expend for the necessary future treatment of same the sum of, to-wit, $200.00.

Premises considered, plaintiff alleges that the has been damaged by defendant by reason of said injuries the total sum of to-wit, $25,000.00.

4 Wherefore plaintiff prays that defendant be cited to answer this petition and that on hearing he have judgment against the defendant for his damages and cost of suit.

M'CART, BOWLIN & M'CART,
Attorneys for Plaintiff.

Filed August 18, 1908.

JNO. A. MARTIN,
District Clerk.

* * * * * * *

Original Answer of Defendant.

Filed Sept. 8, 1908.

In the 67th District Court of Tarrant County, Texas.

No. 27463.

C. C. PRATOR
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Now comes the Texas & Pacific Railway Company, and not waiving but insisting upon its petition and bond for removal, already filed herein, for answer to plaintiff's petition says:

1.

It demurs to said petition, and says that the same is insufficient in law and states no cause of action against this defendant, and of this it prays the judgment of the Court.

2.

For further answer this defendant denies each and every allegation in said petition contained, and of this it puts itself upon the country.

SPOONTS, THOMPSON & BARWISE,
Attorneys for Defendant.

Filed September 8, 1908.

JNO. A. MARTIN,
District Clerk.

5 *Petition for Removal.*

Filed Sept. 8, 1908.

In the District Court of Tarrant County, Texas, 67th Judicial District.

No. 27463.

C. C. PRATOR
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

The petition of the Texas & Pacific Railway Company respectfully shows to the Court:

First. That The Texas & Pacific Railway Company was, and is a corporation, duly organized and existing under and by virtue of the laws of the United States, to-wit: "An Act to incorporate The Texas Pacific Railway Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and Acts amendatory thereof and supplemental thereto, including an Act approved May 2, 1872, whereby among other things the name, style and title of said Texas Pacific Railroad Company was changed to "The Texas and Pacific Railway Company."

Second. That the above entitled action was commenced in the above named Court on the 18th day of August, 1908, and citation issuing therein was served upon this defendant, on the 21st day of August, 1908, which said citation is returnable on the first Monday in September, 1908, it being the 7th day of September, and this defendant is not, and will not be required, by the laws of the State of Texas, or the rule of this Court, to answer or plead to the petition of the plaintiff before the 8th day of September, 1908.

Third. That the matter in dispute in this case exceeds, exclusive of interest and cost, the sum or value of two thousand dollars, and this suit arises under the laws of the United States as hereinbefore and hereinafter more fully set forth; that this action was brought by the plaintiff for personal injuries alleged to have been sustained by him while in the employ of defendant as engineer, said injuries being caused while attempting to jump from his engine in order that he might avoid being in a collision which was imminent.

6 For injuries plaintiff prays that he be given $25,000.00 damages together with cost of suit.

As appears from plaintiff's petition, which is referred to for a more particular statement of the cause of action. That this suit against this defendant is a suit arising under the laws of the United States, and more especially under the laws of the United States constituting the charter of this defendant, and under which it is incorporated, that is to say, the said Act of Congress of the United States, approved March 3, 1871, entitled, "An Act to incorporate The Texas Pacific Railroad Company, and to aid in the construc-

tion of its road and for other purposes," and Acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872, March 3, 1873, and June 22, 1874.

Fourth. That the above entitled action is a civil suit arising under the laws of the United States of which the Circuit Court of the United States for the Northern District of Texas is given original jurisdiction by Act of Congress, approved March 3, 1887, to-wit: An Act entitled "An Act to amend the Act of Congress, approved March 3, 1875, entitled 'an Act to determine the jurisdiction of the Circuit Courts of the United States and to regulate the removal of causes from State Courts and for other purposes,'" and the Acts of Congress approved August 13, 1888, entitled "An Act to correct the enrollment of an Act approved March 3, 1887, entitled 'an Act to amend sections 1, 2, 3 and 10 of an Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from the State Courts and for other purposes,' approved March 3, 1875."

Your petitioner herewith presents and files a good and sufficient bond conditioned that it will enter and file in the Circuit Court of the United States for the Northern District of Texas, on the first day of its next session, a copy of -he record in this action, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite therein. Your petitioner therefore prays the said Court to accept said petition, and bond, and to remove this cause to the Circuit Court of the United States for the Northern District of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By SPOONTS, THOMPSON & BARWISE, *Attorneys.*

7 THE STATE OF TEXAS,
County of Tarrant:

R. Fenby, being duly sworn, says that he is the agent of The Texas & Pacific Company being the auditor of said company; that The Texas & Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States that he has read the foregoing petition and knows the contents thereof, that the facts therein stated are true.

R. FENBY.

Sworn to and subscribed before me this 2nd day of Sept., 1908.

[SEAL.] FREEMAN HALL,
Notary Public, Dallas County, Texas.

[Indorsed:] No. 27463. C. C. Prator vs. The Texas & Pacific Railway Company. Petition for Removal. Filed the 8th day of Sept., A. D., 1908. John A. Martin, Clerk, District Court, Tarrant County, Texas.

Bond for Removal.

Filed Sept. 8, 1908.

In the District Court of Tarrant County, Texas, 67th Judicial District.

No. 27463.

C. C. PRATOR
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Know all men by these presents, That The Texas & Pacific Railway Company, as principal and —— —— and —— —— as sureties, are held and firmly bound unto C. C. Prator, in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made, unto the said C. C. Prator, his heirs and assigns, we jointly and severally bind ourselves, our successors, representatives, heirs and assigns, firmly by these presents, yet upon these conditions, that,

Whereas, the said The Texas & Pacific Railway Company, has filed its petition in the District Court of Tarrant County, for the removal of a certain cause therein pending, wherein C. C. Prator is plaintiff, and The Texas & Pacific Railway Company is defendant, said cause being numbered upon the docket of said Court as
8 No. 27463, to the Circuit Court of the United States for the Northern District of Texas.

Now, therefore, if the said The Texas and Pacific Railway Company shall enter in said Circuit Court of the United States, for the Northern District of Texas, a copy of the record in said suit on the first day of the next session thereof, and shall pay all costs which may be awarded by the said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if the same was originally requisite in said cause, then this obligation shall be void; otherwise, of full force and effect.

Witness our hands and seal, this 1st day of September, 1908.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By SPOONTS, THOMPSON & BARWISE, AND
W. L. HALL,
EDW. O. TENISON,
E. R. LUDDY.

Approved this 8th day of Sept., 1908.

W. T. SIMMONS,
Judge District Court, 67th Judicial District.

[Indorsed:] No. 27463. C. C. Prator vs. The Texas & Pacific Railway Co. Bond for removal. Filed the 8th day of Sept., A. D., 1908. John A. Martin, Clerk, District Court, Tarrant Co., Texas.

Order -or Removal.

Sept. 8, 1908.

Removed to United States Court.

Removed to the United States Circuit Court, September 8th, 1908.

No. 27463.

C. C. PRATOR.
vs.
TEXAS & PACIFIC RAILWAY CO.

This cause coming on this day to be heard, upon the peti-
9 tion of The Texas & Pacific Railway Company, to remove same to the Circuit Court of the United States for the Northern District of Texas, said petition being heard by the Court, and it appearing to the Court that a good and sufficient bond has been filed, and that petition shows proper grounds for removal, the prayer of the said The Texas & Pacific Railway Company is granted and its bond approved and this cause ordered removed to the Circuit Court of the United States for the Northern District of Texas. And the clerk of this Court will make out a transcript of the record in this cause, to be filed in the United States Court for the said District of Texas.

Bill of Costs.

No. 27463.

C. C. PRATOR, Plaintiff,
vs.
TEXAS & PACIFIC RY. CO., Deft.

Clerk's fees:	Pltf.	Deft.
Filing and docketing	$ .35	....
Issg. Citation or writs	1.25	....
Recording returns	.50	....
Flg. papers	.15	.30
Entering appearances	.15	.15
Motions	...	.35
Entering orders	...	.75
Taxing costs	...	.25
Transcript	...	8.40
Total	$2.40	$10.20

Sheriff's fees:		
Executing citations	$ .85	....
Sheriff jury fee	...	$ .50
Total	$ .85	$ .85
Stenographer's fee	3.00	....
Clerk's costs brought over	2.40	10.20
	$6.25	$10.70
		$16.95

10 THE STATE OF TEXAS,
Tarrant County:

I, Jno. A. Martin, clerk of the District Court in and for said County and State hereby certify the above to be a correct account of the costs in the above entitled and numbered suit up to this date.

Witness my hand and the seal of said Court, affixed at office in the City of Fort Worth, this the 19th day of October, 1908.

JOHN A. MARTIN,
Clerk Dist. Court, Tarrant County, Texas.
By TOM L. HOGLE, *Deputy.*

Certificate.

THE STATE OF TEXAS,
County of Tarrant:

I, John A. Martin, clerk of the District Court of Tarrant County, Texas, do hereby certify that the above and foregoing transcript contains a true and correct copy of the record from the District Court (67th Judicial District) of Tarrant County, Texas, to the Circuit Court of the United States, in and for the Northern District of Texas, in cause No. 27463, C. C. Prator vs. The Texas & Pacific Railway Company, as the same appears on file and of record in my said office.

Given under my hand and the seal of said Court, at office, in the City of Fort Worth, Texas, this 19th day of October, A. D. 1908.

[SEAL.]

JOHN A. MARTIN,
By TOM L. HOGLE, *Deputy.*
Clerk District Court of Tarrant County, Texas.

Transcript indorsed: 498 Law. C. C. Prator vs. Tex. & Pac. Ry. Co. Transcript from Dist. Ct., Tarrant Co. Filed 2 day of Nov., 1908. Louis C. Maynard, Clerk. By E. C. Van Dusen, Deputy.

11 *Plaintiff's First Amended Original Petition.*

Filed Nov. 20, 1908.

In the Circuit Court of the Northern District of Texas. Removed from the District Court of Tarrant County, Texas.

No. 498.

C. C. PRATOR
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

To the Honorable Edward R. Meek, Judge of said Court:

Now comes plaintiff in the above cause and by leave of Court amends his original petition filed in the District Court of Tarrant County, Texas (from which Court this cause has been removed to this Court), on the 18th day of August, 1908, and in lieu thereof, the plaintiff pleads as follows:

Your petitioner, C. C. Prator, plaintiff, complaining of the Texas & Pacific Railway Company, defendant, respectfully shows to Your Honor that plaintiff resides in Tarrant County, Texas, and that defendant is a corporation, duly incorporated and has an office and an agent in said State and County.

First. That heretofore, to-wit: On the 2nd day of May, 1908, plaintiff was in the service of defendant as an engineer in charge of an engine and freight train, to-wit: An engine and caboose, going on defendant's line of railway, defendant being a railway company, near Thurber Junction, a station on said line of railway. That another freight train, belonging to defendant, was ahead of plaintiff's train and going in the same direction on said line of railway, and through the negligence of defendant's agents and servants in charge of same, said last named train stopped near Thurber Junction, on the main track of said railway, it being then and there in the night time, and through such negligence of defendant's agents and servants in charge of said train in so stopping said train on the main track of defendant's said railway and not at a regular stopping place for trains, and without having lights of any kind, or the rear end or caboose of said train, and negligently failing to send a flagman back in the direction of plaintiff's said approaching train to give notice or warning that said train had been so stopped, and was standing on

12 said main track, the agents and servants of defendant, in charge of said train, so stopped on said track, well knowing that plaintiff was approaching with his said train, plaintiff, without fault on his part, collided the engine of his train and the rear end of the caboose of said other train, and in said collision, plaintiff was injured as hereinbefore more fully described.

Second. Plaintiff adopts all matters of fact alleged in the above count, and further alleges that defendant's negligence in the premises, among other things, consisted of this: that the said train with

which plaintiff's engine so collided had been negligently stopped by defendant's agents and servants, in charge of same, on the main track of defendant's said line of railway in the night time, and there permitted to stand and in a position to endanger approaching trains, it being in the night-time as aforesaid. That it was the duty of the defendant's agents and servants, in charge of said train, when it was so stopped on said track, under a rule promulgated by defendant for the safety of its trains and employees to protect approaching trains from danger by sending a flagman back to use torpedoes and red lights in the following manner: (Quoting from said rule.) "Flagman (of train so stopped) will place one torpedo on the rail at least twenty telegraph poles from his train, place one torpedo on the same rail at a further distance of two telegraph poles from first torpedo, and then take a position about midway between the two torpedoes to stop the train with red signals. In case the flagman is called in before any train arrives, he will take up the torpedo nearest his train and return to his train as quickly as possible, leaving the furthest torpedo from his train on the rail."

That the agents and servants of defendant in charge of said train with which said plaintiff's engine so collided, through negligence, wholly failed to comply with said rule in any respect whatever. That they negligently failed to send such flagman back any distance whatever from said train, and negligently failed to place torpedoes on a rail of said track at any place, to the rear of said train and in the direction from which plaintiff's said train was approaching same, and negligently failed to have the flagman give red signals as provided for in said rules, and negligently failed to make any attempt, whatever, to comply with any of the conditions so set forth and embraced in said rules to protect plaintiff and his approaching train from danger by reason of said train being stopped on said main track in the night time as aforesaid.

13 That said point where said train was so stopped was not a regular stopping place for either freight trains or passenger trains; that there were no lights of any kind attached to the caboose or rear end of said train with which plaintiff's engine so collided, and it was very dark at said point. That it was the duty of the defendant's servants and agents in charge of said train to have hanging on the rear end of caboose of said train, red lights, under the rules and regulations of defendants, as an additional protection to approaching trains in the night time, and that the agents and servants of defendant in charge of said train, and whose duty it was to so place said lights, negligently failed to discharge their said duty, and negligently failed to *discharge their said duty, and negligently failed to* place any lights whatever on said caboose, or on the rear end of said train, and that by reason of the several acts of negligence, herein alleged against defendant, the said engine of plaintiff's train was thereby caused to collide with said other train so placed and standing on defendant's main track at said point as aforesaid, thereby causing the plaintiff to be injured as hereinafter more fully described.

Third. Plaintiff further alleges that said train with which his

engine so collided, without having any signal lights on the rear end thereof and without being signalled so to do, and without giving three blasts of the whistle, as required by the rules of the defendant, and without a flagman having been sent back as aforesaid, and without said torpedoes having been placed on the rail, as aforesaid, was, when his said engine so collided with said caboose, being run backwards on said main track towards plaintiff's said train, when said collision so occurred, and that it was negligence on the defendant's part for said train to be so moved backwards on said track at said time, and that such negligence of the defendant was one of the proximate causes of plaintiff's injuries.

Plaintiff alleges that when his engine so collided with said caboose, that he had reached the iron steps of his engine in an endeavor to escape from same, and that he was by said collision violently thrown down, the lower part of his spinal column striking said iron steps, or some other hard substance and was violently thrown from there to the ground and seriously injured in and about his spinal column, the lower end of his backbone and his back, sides, hips and nervous system, and in his bladder and urinary organs, and he was internally injured. That at the time plaintiff was so injured he was a strong,
able-bodied man, earning and capable of earning an average
14 of about $200.00 per month, and by reason of said injuries he has been unable to labor, or earn any money since he was so injured, and that he is and will be so permanently disabled and incapable of laboring and earning any money in the future, by reason of said injuries.

Plaintiff alleges that he was of the age of, to-wit: Forty-five years at the time he was so injured, and that he was a capable and skillful locomotive engineer in the railway service in which said service he had been engaged for many years. That in such business he was capable of earning an average of about $150.00 to $200.00 per month, but by reason of said injuries he has been wholly incapacitated to ever again follow said avocation or business, and will never again be able, by reason of said injuries, to pass the physical examination required by all railroad companies of those who enter their service as locomotive engineer.

Plaintiff alleges that by reason of said injuries he has suffered and will in the future suffer great mental and physical pain and anguish from said injuries, they, in their nature, being permanent.

Plaintiff further alleges that he has paid out and incurred to physicians and for medicines for the necessary treatment of his said injuries, the sum of, to-wit, $200.00, and that he believes that it will be necessary for him to have said injuries so treated in the future, he not having recovered from same, and that he will so expend for the necessary future treatment of same, the sum of, to-wit, $200.00, said sums being reasonable charges therefor.

Premises considered, plaintiff alleges that he has been damaged by defendant by reason of said injuries the total sum of, to-wit, $20,000.00 (twenty thousand dollars).

Wherefore, plaintiff prays that defendant be cited to answer this

petition and that on hearing he have judgment against the defendant for his damages and cost of suit.

R. M. WYNNE,
McCART, BOWLIN & McCART,
Attorneys for Plaintiff.

Indorsed: No. 498. Law. C. C. Prator vs. The Texas & Pacific Ry. Co. 1st Amended Original Petition. Filed 20 day of Nov., 1908. Louis C. Maynard, Clerk.

15 *Defendant's Amended Original Answer.*

Filed Nov. 24, 1908.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

No. 498.

C. C. PRATOR
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Now comes The Texas & Pacific Railway Company, and by leave of the Court files this, its amended original answer in lieu of its original answer filed herein, and says:

I.

It demurs to plaintiff's petition for the reason that the same shows no cause of action

II.

For further answer, if so required, it denies all and singular the allegations in plaintiff's petition contained.

III.

For further answer, if so required, defendant says plaintiff cannot recover for the reason that he, himself, was guilty of negligence which directly caused and contributed to the accident. It says that the plaintiff's said contributory negligence consisted:

(1) In failing to be on the lookout to discover any other train or car on the track over which he was running his engine.

(2) In not having some other person or persons to be on the lookout to discover said car or train.

(3) Plaintiff was at the time running and operating his train or engine within what is known as the yard limits at Thurber, Texas, that under and by virtue of the rules and custom of the company and which were well known to said plaintiff, it was his duty while running his engine within the yard limits at Thurber, Texas, to

have his train under control, expecting to find a train or a car standing on the track over which he was running, at any time;
16 that his train should have been under such control that he could stop same immediately and avoid coming in contact with any standing train.

It says that notwithstanding such rule, custom and habit prevailing, said plaintiff did negligently run and operate his train so that just prior to the said accident same was not under control, but same was running at such excessive rate of speed in violation of the rules, customs and practice that he was unable to stop same within the time prescribed; that had he looked, or been on the lookout for any standing train or car he could have discovered same in time to avoid the accident, and had he been running his train at a careful rate of speed he could have stopped his train in time to avoid accident, before the collision. It also says plaintiff was negligent in not having his headlight burning so as to enable him to discover any car, and was negligent in not stopping his train after he knew, or should have known, that there was danger of coming in contact with any car or train. It says that plaintiff knew, or was bound to know, that cars or trains were liable to be upon the track over which he was operating his train, and it was his duty to operate his train with reference thereto, and to be on the lookout for such cars or trains, and to have his train running at such speed that he could stop the same without coming in contact with such cars, and that the said plaintiff failed in all these respects, and that such failure directly and proximately caused and contributed to his accident and injuries, and therefore, he cannot recover.

IV.

For further answer, if so required, defendant says that if there was any rule in existence, as alleged in the plaintiff's petition, same had no application within the yard limits and at the place where the accident occurred; that such rule was intended to apply and have effect on the main line and away from stations and yard limits; all of which was well known to the plaintiff, and that the plaintiff knew that any train which would be stopped in the yard limits at Thurber would not be expected to flag or place torpedoes out against any other following freight train of the kind and class that plaintiff was operating.

SPOONTS, THOMPSON & BARWISE,
Attorneys for Defendant.

Indorsed: No. 498. In the Circuit Court of the United
17 States for the Northern District of Texas, at Fort Worth. C. C. Prator vs. The Texas & Pacific Railway Co. Defendant's Amended Original Answer. Filed Nov. 24, 1908. Louis C. Maynard, Clerk.

Judgment.

Entered November 18th, 1909.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Fort Worth, November Term, A. D. 1909.

No. 498.

C. C. PRATOR
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

NOVEMBER 18, 1909.

On November 11th, 1909, this cause was regularly called for trial and came the parties hereto, plaintiff and defendant, by their respective attorneys, and announced ready for trial; then came a jury of twelve good and lawful men, to-wit: John T. Montgomery and eleven others, who were duly and legally selected, empaneled and sworn to try this cause; and the jury having heard the pleadings read, the evidence, argument of counsel and charge of the Court, retired to consider of their verdict and thereafter, on this the 18th day of November, A. D. 1909, returned into open Court the following verdict, to-wit:

"We, the jury, find for plaintiff and assess his damages in the sum of three thousand dollars.

JNO. T. MONTGOMERY, *Foreman.*"

It is, therefore, ordered and adjudged by the Court that the plaintiff, C. C. Prator, do have and recover of and from the defendant, the Texas & Pacific Railway Company, the sum of three thousand ($3,000.00) dollars, together with all costs herein incurred, for all which let execution issue.

From Minute Book 3, page 354.

18 *Defendant's Amended Motion for New Trial.*

Filed Dec. 6, 1909.

No. —.

In the United States Circuit Court for the Northern District of Texas.

C. C. PRATOR
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Now comes the defendant and files this, its amended motion for a new trial and prays the Court to set aside the verdict of the jury rendered herein and grant a new trial for the following reasons:

I.

The Court erred in refusing to grant the special charges requested by the defendant.

II.

The Court erred in the admission of testimony as appeared by bills of exception.

III.

The verdict of the jury was contrary to the great weight of evidence, in that it appeared that said C. C. Prator, in the discharge of his duty and in the exercise of reasonable care, could have discovered the standing caboose in time to avoid the accident, and that it was his duty to be on the lookout for same and to have his train under control so that he could stop same in time to avoid an accident; and, therefore, the said Prator was guilty of negligence which directly caused and contributed to the accident. That he was running his train at a faster rate of speed than reasonable care and the rules would permit; that he failed to be on the lookout and discover the said standing caboose in time to have stopped his engine before striking same; that had he exercised reasonable care in these respects the said accident would not have occurred, and that he, therefore, should not be allowed to recover.

19 IV.

The great weight of the evidence showed that the plaintiff, Prator, was guilty of contributory negligence in failing to discover the standing caboose, and in failing to have his train under control, and in failing to comply with the rules and regulations under which he was working, and that such failure direct-y caused and contributed to said accident; and, therefore, he should not be entitled to recover.

V.

The great weight of the evidence showed that at the time of the accident there was no necessity for any rear lights on the standing caboose, and, therefore, the defendant was not liable with respect thereto.

Respectfully submitted,
SPOONTS, THOMPSON & BARWISE,
Attorneys for Defendant.

Indorsed: No. 498. In the United States Circuit Court for the Northern District of Texas. C. C. Prator vs. The Texas & Pacific Railway Company. Amended motion for new trial. Filed 6 dav of Dec., 1909. Louis C. Maynard, Clerk. By E. C. Van Dusen, Deputy.

Order Allowing Time in Which to File Bill of Exceptions.

Entered January 3rd, 1910.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Fort Worth, November Term, A. D. 1909.

No. 498.

C. C. PRATOR
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

JANUARY 3rd, 1910.

On this day came on to be heard the amended motion of the defendant for a new trial herein, and the Court having heard and considered said motion, is of opinion same is not well taken; it is, therefore, ordered by the Court that the said motion be and same is hereby in all things overruled.

It is further ordered that the defendant have sixty (60) days from and after the adjournment of this term of Court within which to prepare and file its bill of exceptions.

From Minute Book 3, page 366.

Defendant's Assignment of Errors.

Filed March 1, 1910.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

C. C. PRATER
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Now comes defendant, The Texas and Pacific Railway Company, by counsel, and says that in the record of proceedings in the above entitled cause, there is manifest error, and files the following Assignments of Error:

I.

The Court erred in refusing to give Special Charge No. 1, asked for by the defendant, which requested the Court to instruct the jury to find for the defendant.

II.

The Court erred in submitting to the jury for its finding, the question as to whether or not C. C. Prater, the plaintiff, was guilty of contributory negligence, for the reason the Court should have held

as a matter of law, that under the undisputed evidence, he was guilty of contributory negligence, directly and approximately causing and contributing to the accident and his injuries.

III.

The Court erred in not instructing the jury that the plain-
21 tiff, C. C. Prater, could not recover, for the reason that the undisputed proof showed conclusively that he, the said Prater, was guilty of such negligence as directly caused and contributed to the accident and his injuries.

IV.

The undisputed testimony showed that plaintiff, C. C. Prater, in the discharge of his duty and in the exercise of reasonable care on his part, as he approached the caboose with which his engine afterwards collided, should have had his train and engine under control, and that it was his duty to be on the lookout for any train which might be standing on the track, and according to the testimony, if the said C. C. Prater had had his train under control and had been on a reasonable lookout and had exercised reasonable care, he could have stopped his train before same struck the standing caboose, and he, therefore, was guilty of negligence which directly caused and contributed to the accident and his injuries, and the Court should have so instructed the jury instead of submitting this as an issue of fact for the jury to pass upon.

V.

The Court erred in not granting a new trial in this cause, for the reason that the undisputed evidence shows that plaintiff, C. C. Prater, at the time he approached the caboose and train to which it was attached, did not have his train under control, and that he failed to be on the lookout and discover the said caboose; whereas, if his train had been under control and he had exercised the proper lookout, the said accident would not have occurred; and the verdict, therefore, is against the undisputed evidence, and the said plaintiff should not be allowed to recover herein.

IV. [VI.]

The great weight of evidence shows that the plaintiff, C. C. Prater, was guilty of contributory negligence in failing to discover the caboose and in failing to have his train under proper control, and in failing to comply with the rules and regulations under which he was working, and that such failure directly caused and
22 contributed to the accident in which the said C. C. Prater complains, and the Court should have granted this defendant's motion for a new trial *in* said ground.

Respectfully submitted,

W. L. HALL.
M. A. SPOONTS.
GEO. THOMPSON.
J. H. BARWISE, JR.

Indorsed: No. 498. In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth. C. C. Prater vs. Texas & Pacific Railway Company. Defendant's Assignments of Error. Filed 1 day of Mch., 1910. Louis C. Maynard, Clerk. By E. C. Van-Dusen, Deputy.

Bill of Exceptions.

Filed March 2, 1910.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

No. 498.

C. C. PRATER, Plaintiff,
vs.
TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

Be it remembered, That upon the trial of the above entitled cause, evidence was introduced, facts proven and proceedings had of which the following is a full and correct statement:

S. N. YOUNGBLOOD, a witness for the plaintiff, being duly sworn, testified as follows:

My name is S. N. Youngblood; I live at Fort Worth; this has been my home for about eighteen years. I am a locomotive engineer.

I am acquainted with the plaintiff, C. C. Prater. I have known him something like four or five years. I am in the service of the Texas and Pacific Railway Company at this time. In May, 1908, I was engaged as locomotive engineer for the Texas and Pacific Railway Company. I have been an employé of the Texas and Pacific Railway Company for pretty nearly twenty-three years.

23 I was at Thurber Junction on the second day of May, 1908, at the time Mr. Prater, the plaintiff in this case, was injured by a collision. Immediately before I heard of the accident we were on the passing track at Thurber Junction; I was running an engine—pulling a train; we were in on the side track—passing track. I don't remember how many cars were in my train, something like twenty-eight or thirty.

(Witness is shown a plat or diagram of the railroad yards at Thurber Junction.)

This (indicating), is what is called the east "Y." This is what is called the west "Y." My train was on the passing track; my engine was up here (indicating); there was a train here on the main line, and they wanted us to pull up here so this train could get out on the "Y." This represents the road crossing; there is a road crossing right in here somewhere (indicating); I think my

train had been cut at the road crossing; I think we coupled up to pull down here; that is my recollection; we coupled up and pulled clear back here; we went up here close to the main line; I don't think we went out on the main line track.

When I pulled my engine down off of the passing track onto the west "Y" to clear the track at the east "Y," it was not real dark, and it was not real light; it was dark enough that I had lit light headlight to pull down. I think I turned it on about the time we went to couple up, so in pulling down I could see what we were doing; I don't remember seeing any other lights around there at the time, that is, close; there was an engine on the main line down there somewhere close; I don't think it had its h-adlight burning; Mr. Verney was the engineer of that train; Mr. Nichols was the conductor, I think. When I went to pull down to clear the east "Y" I think that train was standing up on the main line; we backed up to clear the crossing, and it seems to me they were standing up above the switch somewhere. It seems to me it was right there close to the switch on the main line. I won't be positive; there was a caboose standing there somewhere on the main line. My best impression is that Verney's train was on the main line; I am not positive where the engine was; I know where the engine was when we went to see Mr. Prater. When we went to couple up at the crossing I think we pulled down pretty close to the main line; I don't think I was down on the main line at all; we were something close within the clear. My best impression is that Verney's train was about the switch—I think it was above the switch, but I won't be positive, behind this caboose on the main line. It seems to me like
24 the headlight of this engine that was pulling this train over on the main line had its headlight burning at the time I heard of the collision. Somebody came back and said there had been a collision; I didn't hear the collision myself—I never heard him run into the caboose; somebody came up and said he was hurt, and after pulling down to cut the crossing I took my torch and went down to the caboose. I found Mr. Prater in the caboose on a cushion; I don't know just how far that was from the west "Y"; it must have been 350 feet, I guess, though I never measured it or stepped it. I stated that I lit my torch to go down there to see Mr. Prater; when I heard of the collision I started down there and Verney's engine was standing right on the cattle guard; I remember that, because I had to go around this engine when I went down there.

(Witness is here shown photographs of the surrounding- and makes explanation of same.)

This engine was about that cattle guard; the cattle guard is west from the west "Y," but not very far, twenty or thirty or forty feet, probably. I locate Mr. Verney's engine at the cattle guard, because I had to climb the post, I recall that; I didn't notice whether there was a headlight burning on that engine or not. If there had been a headlight burning I expect I would have noticed it; my recollection is there were twelve or thirteen or fourteen cars in Verney's

train—a pretty good, long train. I don't remember seeing any lights on the rear end of that train—on the caboose. There is a grade there, and I think it must be higher up in the yards where I was than it was at the point where the collision occurred. On one side of the track there is a kind of mountain, with timber on it. The mountain kind of slopes back to where the curve is in the track; there is a curve before you come to that point. This seems to be a good picture of the location there (referring to one of the photographs). This also seems to be a good picture (referring to another photograph).

(Here witness explains surroundings from the photograph.)

In coming around this curve the engineer is on the right-hand side coming east, and the fireman is on the left-hand side. It is the duty of the man on the inside of the curve to keep a lookout.

The witness, YOUNGBLOOD, resumed:

When I was on the stand yesterday I spoke of a train on the main line pointing east with the caboose to the west some distance east of the west "Y." There were caboose lights on that train on the main line.

Coming around that curve, where the collision is said to have occurred, at the point where we found Mr. Prater, it curves to the right—curves to the left, coming east; it is a pretty sharp curve; coming in this direction it curves this way (indicating). I don't know what degree of curve it is; I have been going up and down the road there for about eighteen years, over the same track every few days—every week, or such as that. In coming east the engineer can't see very far directly ahead of his engine. We have the fireman look out for us after coming down to the whistle board; we usually have the fireman look out; I suppose you can see about two rail lengths looking out—that is if you look out the front, looking at the rails. There is a window you can sit right straight up and look out, and there is a side window, too; the engineer in coming around curves of that kind would look out as far as he could, and make the fireman look out; the fireman is on the inside of the curve.

I think I am familiar with the rules in the time table in force at that time. I noticed the condition of the train at the point of the accident; the engine had knocked the back trucks of the caboose up under the caboose like; it was kind of up on the pilot—the end of the caboose and the car right next to it was kind of mashed up a little, I don't know what the damage was exactly; I was looking around with my torch; I went up in the caboose to see how Mr. Prater was; there were no wheels off the track. I don't know how long our lights were out; the caboose on the train on the main line had lights out, I don't know how long they had been out.

There was a rule or custom with reference to sending a flagman back to give a signal or warning to approaching trains where the train was stopped in the position Verney's train was—the train collided with on the main line.

Cross-examination:

Thurber Junction is 76 miles west of Fort Worth; it is 64 miles east of Baird; on the second day of May, 1908, the day of the accident I left Fort Worth for Baird; my run was from Fort Worth to Baird; at Thurber Junction there is a branch line or track that runs out to the Thurber mines, I suppose four miles, I don't know exactly how far; that branch line, or connecting line out to
26 the mines is used to take cars out there to the coal mines—coal cars go out there empty and come back loaded with coal. The cars are switched out of there and then onto the main line; they keep a regular switching crew and engine up at Thurber, but not at the Junction; we have to do the switching after switch engine brings the cars down to the junction; Thurber is about four miles south of the junction; they have two engines to bring coal down there and take the empties back.

I was going west on this train on this occasion; Mr. Hale was my conductor, I think; we had been at Thurber Junction some lit-le bit before I heard of the accident. We went in on the passing track.

(Witness is shown plat of the yards at Thurber Junction.)

Thurber is off to the south; this is the main line (indicating) here; this is the passing track; the middle track is the house track, and the south track is the passing track; these two lines meet down south of this, and are the legs of the "Y," and goes on to Thuber. They don't come out at acute angles; it is not straight like that.

When I got there I pulled in on the passing track—the south track; the middle track is the house track; I pulled in on the south track, headed west; I cut my train for the public road crossing; I came in on that track because the main line was blocked, but we had no right to the main line; my idea was to get in and get clear so we could pull out for Baird; I don't know [how] long we had been there when I heard of the accident; it must have been thirty minutes, something like that; may be a little longer. I didn't see Verney; I saw his train pull in from the west; it stopped down about the cattle guard—there is where his engine was; I didn't see Verney, I saw his train standing there; I was then on the passing track with my engine headed west. This (indicating) correctly represents the curve, this being the west; this shows the two legs of the "Y." (Referring to blue print.) This track runs up to Thurber, the middle track is the house track and the third track is the passing track; the cattle guard is right close here; it seems to me this — too far; this is a little too straight; the switch is twenty-five or thirty feet here, I don't know just how far. This is the point where the collision is said to have occurred (indicating); there is a trestle still further west—a little further west; still further west is the yard limit board. It seems to me this is too straight. Of course, I am not familiar with the blue print; this shows the curve; this curve is not true; there is a curve there, but I don't know the degree. The station is here now, the station was there at that time (indicating).

27 When we started out for Baird I don't remember what my first stop would be; Strawn would be the next station; it is four miles to Strawn; I turned my headlight on when I went to pull down to let this engine come in on the main line. There is a rule requiring the headlight to be turned on from sundown to sunup—burn from sundown to sunup. This signal board out west of the trestle means for you to have your engine under control, so if there is any obstruction on the main line or anything—not to hit anything. When a train is coming from the west, going east approaching Thurber Junction station, when we reach this yard limit board we always put the engine under control; that is the purpose of the board, to come in under control and not hit anybody if possible. I would consider that six miles an hour would be under control. It is my opinion that in passing that yard limit board and approaching from there on to Thurber Junction you should have your train running down to six miles an hour; we are always on the lookout, or have the fireman look out; the engineer can't see very far. Time and again I have called the fireman's attention and made him look out; say if I come down to six miles an hour if I release my brakes I have not got them charged up right quick and I want to see if there is anything comes up; that is my idea of the slow board. The engineer is on this side of the curve and the fireman is on that side—on the inside; the fireman can look across this way, like a string to a bow; that does not relieve the engineer from looking out as far as he can, but the fireman has a better show. When I have told the fireman to look out we both look out; irrespective of what I tell the fireman, it is my duty to be on the lookout for standing trains after we pass the yard limit board. It is the engineer's duty to be on the lookout all the time. If an engineer is coming in and his headlight is burning, it shines ahead of him; it shines down the track and spreads out; in some places it shines down the track and in some places it don't; it is owing to the degree of the curve; there is a window right in front of the engineer, he can look out; there is also a window to his right that he can look out.

The first thing that attracted my attention to the fact that an accident had happened, a brakeman or some one, after we had pulled down there, came up and said Mr. Prater had hit a caboose down there on Verney's train. We backed up and cut the crossing, and I took my torch and went down there. When I heard it I think we then backed up and cut the crossing on account of this engine
28 coming out of the way on the main line—of course, we would have to back; then we backed up and cut the crossing the same as we were before, and I took my torch and went down there; that took sometime; five or six minutes—eight or ten minutes, probably, and then took five minutes to walk down there; I don't know [how] long after the accident before I heard of it, suppose ten or fifteen minutes. When I got there a number of people had gathered; the doctor was there, and I think the conductor and brakemen and firemen was there, I won't be positive. He had been put in the caboose; time enough had elapsed after the accident before I got there for them to send for a doctor and the doctor come over there

and they put him in the caboose. I don't remember what time I got to Thurber Junction that evening; it was between sundown and dark, somewhere along there, about sundown, I guess. I think the track is about level from the trestle up to the cattle guard, along where the accident occurred; it is up grade at the switch and down grade about the yard limit board; you can round the curve and will roll along there. I judge about the bridge it must be about level. Taking that grade there, say at the trestle—run past the trestle coming up there running six miles an hour with an engine and caboose, with the braking apparatus working in good order, I think by the use of the appliances a caboose and engine could be stopped in seventy-five or eighty feet. I have never made a test that way; of course, it would be owing to the condition of the rails; on a dry evening the conditions would be good for stopping; that would be my judgment, that you could stop in seventy-five or eighty feet under these conditions, going at six miles an hour. I never made a test myself, and have never seen a test of that kind made.

It was not a cloudy evening—not stormy; it was apparently an ordinary evening; I don't think it was cloudy much, just an ordinary evening, I know it was not stormy.

Redirect examination.

The headlight on the engine is stationary, and if the track is straight, it throws the light straight up the track; in coming around a curve the main focus of the light would be off the track.

I said I saw Mr. Verney's engine standing up there on the main track just west of the cattle guard; when I was standing up here (indicating) I suppose that was about 100 feet from me; I was in
29 here (indicating) just in the clear. I am in the clear here, and the cattle guard there I suppose was 100 feet in the clear, right here (indicating). This looks straighter to me than the curve on the ground; I don't know the degree of curve, but that looks kind of straight; I never undertook to make a test in stopping an engine to see how quick it could be stopped.

Recross-examination.

The headlights used were electric headlights; if the track is straight the main focus goes right straight down the center of the track.

Approaching this point where the collision occurred, say from the trestle, if you come from the trestle with your engine going east with your headlight burning, there is not a time when the light from that headlight will not show on the rails ahead of you, but the main focus will not show on the rails; the rays of the headlight will shine on the rails, but not the main focus of it.

A. C. SMITH, a witness for the plaintiff, being duly sworn, testified as follows:

My name is A. C. Smith; my occupation now is driving a wagon for the Cobb Brick Company.

In May, 1908, my occupation was locomotive fireman for the Texas and Pacific Railway Company; I had been in that occupation two years and four months; I have been railroading two years and seven months; that is, for that company. I am 28 years of age.

I know the plaintiff, C. C. Prater; I had know- him something like a year, I believe. On the day of the accident to Mr. Prater, to the best of my recollection, we started from Ranger; we were in the chain gang service—first one in and then another—freight service. At that time I was firing for Mr. Prater. We started from Ranger with a train in sections; I don't remember how many sections there were. It was about dusk when we got to Thurber—at the time of the accident; I don't know that I can express it any plainer than that; most anybody knows what I mean by that; it was not as dark as it could be and it was not as light as it could be. Our train had been lighted up; no, the headlight was not put out—it was burning; I can't say whether the rear lights were burning or not. I don't remember where we were when the headlight was turned on; I don't remember passing the water tank; just before the accident I was sitting on my seat in the engine on the left-hand side.

(Witness is shown plat of the Thurber Junction yards.)

Here is the west "Y" (indicating); this is the point of the collision; back here is the little bridge; I was up on this side of the engine—on the left-hand side; I was sitting there most of the time, when I was not putting in a fire; just before the collision I was looking out—looking ahead, watching for anything that might be on the track. When we got in sight of Thurber Junction I saw this train with lights up near the depot; I was up here on the left-hand side of the curve looking out for anything; I didn't see anything on the track ahead of us until we were right close to it; then we collided with another train—caboose; I saw no lights on the caboose of that train; if it had any lights on it I didn't notice them; I didn't see any; if there had been any lights on it I suppose I would have seen them.

Mr. THOMPSON: The defendant will admit that there were no lights on the rear end of the caboose.

The WITNESS: The first thing I saw was the rear end of the train we struck; when we got right close to it I saw it; as we came around the curve our headlight would naturally turn with the engine, and I saw it show on the caboose as soon as it came on it. I "hollered" "look out, we are going to hit something," and jumped off; I jumped off on the left-hand side—the north side. I jumped off as soon as I could; after I jumped off the engine continued to run and struck the other train; when I jumped off I fell; I moved as I fell and when I stopped I got up and stood there and looked until it struck; our train consisted of only a caboose and an engine; when I got up and

stood there I don't know just what distance I was from the rear end of our caboose when it struck; the caboose was possibly a car length ahead of me—maybe not so far; anyway, it was not so very far. The end of the caboose was not a great ways ahead of me when it stopped. I don't remember the exact distance. A car length is thirty odd feet, I believe; a caboose is about the same; the engine and its tender and appliances is longer than a car, I don't know just how long it is.

31 Before the collision we were approaching Thurber and I was on the lookout; when we came around here (indicating) I said I saw a lighted train; they were up further east than the train we struck. This train standing ahead of the train we struck was on the main line, the same as the train we struck; I saw his tail lights; also a fellow on the passing track; he was headed west; I saw his headlight burning; I saw them looking across the curve this way (indicating). I don't know how far I could have seen the train we hit before we hit it if there had been rear lights on it; I believe I could have seen it before I saw these others. I would not undertake to say how far back west I could have seen it, because I don't know; I don't think [I] could even approximate it. (Witness refers to blue print map.) I remember this little bridge here; I remember the yard board west of the bridge; I judge I could have seen the caboose we struck one hundred yards, if it had had rear lights on it; I don't know whether I could have seen it from that bridge or not; I don't remember just how the bridge lay; I remember the bridge all right; my recollection is the bridge was not a great ways from the west switch; something like a train length; I mean by the "west switch" this switch right here (indicating); I don't remember how that bridge lay—that is, close enough to tell you. If that track had been straight there would have been nothing to obstruct my view from back here; I had been running over that track about two years; I remember how it was on the ground; there is a curve there and sum [some] timber around there; I don't know how far you could see the headlight; the best of my recollection you could possibly see it from where we collided on back I guess a couple or three hundred yards away. I noticed these other lights over in the yard, you may say, just a second before I noticed this other fellow. No, no, it was not half a mile over there to town; it was five hundred or six hundred feet, I guess.

To the best of my recollection we were running as we approached the point of the collision between eight and twelve or fifteen miles an hour, something like that. Yes, I made a signed statement in this case. I remember the speed now as well as I ever did; I think I can come as close to the speed as I ever did.

(Witness is shown statement heretofore made.) It says here eight to ten miles an hour; the engine was drifting; I mean by drifting that the engine was moving without the use of steam—the steam had been shut off.

32 I saw no signal or flag sign or any indication that this track was obstructed before I saw the headlight on this caboose; that is the first warning I had that the track was obstructed at that point.

Cross-examination:

I knew we had passed the yard limit board; that is west of that trestle; we had just an engine and caboose; I was riding on the left-hand side, or north side of the engine; Mr. Prater, the engineer, was on the right, or south side; the first thing that attracted my attention to this standing caboose—the one we ran into was—I was watching out as I said, looking ahead and finally I saw it; I saw the headlight of the engine shine on it; the headlight of the engine came around and threw the light on it; it was not shining directly on it, because we were on a curve; but there was enough rays of the light to show the caboose. Then I hollered to the engineer and jumped off; I says, "Lookout, we are going to hit something." He put on the air; I was sitting in the cab; I says, "Look out, we are going to hit somebody," or something of that kind; we would all understand that. I just turned as I got off the seat—I turned and got off on my side—got down to the step and jumped off. I didn't have far to go to get off the engine; I was sitting on my side of the engine and back of the cab of the engine, is, was, is called the deck, all I had to do was to turn around and then I was in the deck, then catch hold of the hand hold and — down and jump off. I would have to go about as many steps to get off as I would to get off of this—about like this (witness stand).

I don't remember what I said before as to how far this caboose was from me when I first observed it; of course, I have got to say the same thing, I can't swear one thing one time and another thing another time; I suppose what I swore on the last trial would be more apt to be correct; I stand by that *is* being more correct than what I say now; I don't remember what I said on the former trial well enough to make a statement. The best of my recollection is now that when the caboose first showed up it was something like six or ten car lengths from me, when I first saw it; I don't remember, something like that, I can't say. I don't remember where I was with reference to that trestle when I first saw the caboose. After I hit the ground the caboose and tender passed beyond me; I just went down to the edge of the dump; I went down to what you call the bottom of the dump; I don't remember how far I was from the
33 end of the caboose; then I had to walk back up the dump and walk up to the point of the collision. When I first saw Mr. Prater he was on the ground on the north side of the dump, at the bottom of the dump. I don't remember how far it was from the end of the caboose; my recollection is it was just about even with the caboose—just down to the left side of the caboose, about even with the caboose. I don't know of my own knowledge just what time the accident occurred. It was not as dark as it could be; it was on the second day of May; it was after sundown; I hardly know what you mean by twilight; it was about dusk; I don't know whether I could see up and down the track after the accident, and sell telegraph poles, etc., or not; I was not thinking about that. When I "hollered" to the engineer I felt the air go on. Prior to the time I discovered the caboose I don't remember whether Mr. Prater had

said anything to me about being on the lookout or not, or anything of that kind.

Q. Your train—you spoke of the rate of eight, ten, twelve or fifteen miles an hour; your train was moving some, it was not going at a snail's pace?

A. You know what I said, that is the best of my recollection.

Redirect examination:

I said that what I testified to before about how far back I was when I first saw the caboose would be more apt to be correct *that* [than] what I say now.

Mr. BOWLIN: Do you remember how you testified before?

Mr. THOMPSON: We object.

Mr. BOWLIN: We have a right to refresh his memory.

The COURT: I will permit the witness' memory to be refreshed; the witness' memory may be refreshed if he shows it can be. If he has the proper papers to refresh it with.

Mr. BOWLIN: Do you remember that?

34 A. I don't know, not distinctly, no.

Mr. BOWLIN: With reference to whether it was light or dark, I will ask you to look at that (hands witness paper).

A. This is my statement; I dictated this statement.

Q. Now, I will ask you to state whether or not it was light or dark at that place at the time of the collision.

Mr. THOMPSON: We object, it is an exparte statement.

The COURT: You are not to state what you find in this statement, but if that serves to refresh your recollection of the evening as it was at the time, you will be permitted to say that your recollection is refreshed and give your testimony as to whether it was light or dark.

Q. What do you say now, having seen the statement, as to the condition of the light or darkness at the time of the collision?

A. I say the same thing, because I think the word means practically the same thing; "quite dark;" I say now it was about dusk; I think that would mean the same thing as "quite dark," or "dusk." Sometimes I would use the words "quite dark" instead of "dusk," probably. Sometimes in speaking of the light if it be dusk, I might say it was "quite dark;" when I say "quite dark" I mean about dusk. That is what I mean, quite dark, or dusk.

Q. The truth of the matter is you didn't see it until the headlight went on it? Was the state of the darkness such that you couldn't see it until the headlight went on it.

A. My answer to that would be——

Q. Answer the question "yes" or "no." It is capable of an answer, yes or no. Read your statement.

The WITNESS: I have read that al- right; yes, I could have seen it; you asked me the question if I could have seen it before the headlight reflected——

Q. Was it so dark you could or could not have seen it?

A. At some times I might have noticed it, that time I did not.

35 Q. Were you looking for it?

A. Yes, I was looking for anything that might be around.

Q. You had no skylight on it?

A. No, sir, I don't remember that we did, I don't believe we did.

Mr. Bowlin: You didn't tell me since the former trial that your testimony would be any different about whether or not it was too dark for you to see until the headlight got on it? You haven't told me your testimony would be different?

A. No, sir.

Q. What did you tell me you were going to do at this time on this trial about telling the truth?

A. I am going to tell the truth as near as I can.

Q. You told me you were going to tell the truth exactly?

A. Yes, sir.

Q. And I told you that was all I wanted?

A. Yes, sir.

Q. Just look at that between the marks (referring to his former statement). Just hand it to the Court, when you look at it. I want to use it in this way: I want to read it to the witness and question him minutely and in detail as to the truth of that statement contained in these marks—these cross marks; it is within the discretion of the Court; the attitude of the witness calls for that course to be taken. (The Court examines statement.)

Mr. Bowlin: In talking to me yesterday evening you stated, did you not, that you only flinched on one point before, and that was the distance this caboose was from you when you saw it, so that you got confused on cross-examination, and that you were not going to flinch on that or any other point on this trial. Is not that what you stated in substance?

A. I stated that I was going to state the truth, and that furthermore I would not get excited if I could keep from it.

Q. What did you say about not flinching on but one point before you, and that you would not do that on this trial?

A. I don't remember whether I did or not. I remember talking to you. I don't remember using the word "flinch."

Recross-examination:

36 I am now driving a wagon for the brick company; I quit railroading about four months ago; nobody has talked to me on behalf of the railroad company since the last trial; I have not talked to anyone connected with the railroad company.

I can't say how far I could have seen the caboose without a headlight; I could have seen it without any headlight, but I can't say how far I could have seen it. I don't know whether I could see a house uptown or not. I was not looking for that, I was looking ahead.

Redirect examination:

Mr. Bowlin: Are you trying to get back in the railroad service?

A. I am looking for a job all the time.

DICK WEISON, a witness for the plaintiff, being duly sworn, testified as follows:

My name is R. Weison; I live at Fort Worth; I have resided here about 18 years; my occupation is that of a locomotive engineer on the Texas and Pacific Railway Company; I have been in the service of the Texas and Pacific Railway Company about twenty years. I started in as engine wiper; I have been locomotive engineer about ten years. In May, 1908, I was on a freight run; I didn't have any regular run, I run first in, first out; my run was between Fort Worth and Baird, Texas; I was at Baird on the second day of May, 1908; I started to Fort Worth; the trains were run in sections; I think I started out of Baird as first ninety-two; Mr. Prater followed me out of Baird; there were three sections of ninety-two; I had first ninety-two and Mr. Prater followed me out of Baird. I don't know who was behind him. I don't remember what time we left Baird—sometime in the afternoon; Mr. Prater passed me at Cisco; then I was second ninety-two, as near as I can remember; we got one signal order at Baird and got another signal order at Ranger; when trains are run in sections, as in this case, you have one ninety-two, another man has second ninety-two and another man has third ninety-two, all headed the same way; if I have section one, of course, I know there is another section following me and liable to come any time. Ranger is about eighteen miles west of Thurber Junction. I came on the scene after the accident occurred; when I got there Mr. Prater was lying in the caboose when I saw him. I don't know the
37 condition of the wreckage—I didn't go to the wreck, I just went to the caboose and saw Mr. Prater and he asked me to look at his engine and see how badly damaged it was; I examined Mr. Prater's engine; the pilot was smashed off—several braces mashed and bent; I didn't notice any particular thing, I just looked at the engine with a view of finding out whether she could handle herself or not; I didn't notice the headlight; I didn't climb up to see how it was; I looked at the trucks and wheels. I think the oil pipe was broke; but there was nothing to keep the engine from moving itself; the headlight was out—it was not burning; I don't know whether it was damaged or not, I didn't examine the headlight; the caboose the engine ran into had been taken away when I went there; I don't remember what time it was when I got to the caboose where Mr. Prater was; I judge about 8 o'clock somewhere along there; the first notice I had of a wreck being there I was flagged by a brakeman; I don't know how far back; it was in the neighborhood of that little bridge; I don't remember how far back I saw Mr. Prater's caboose; I saw the flagman before I saw the caboose, I don't remember how soon I saw the caboose; I cannot say how far back I saw the lights on Mr. Prater's caboose.

(Witness is shown plat, or map, of the Thurber Junction yards.)

I cannot tell how far back here I could see lights on a caboose unless I measured the distance. When you come around this curve —this second curve west of Thurber, you can see a considerable ways, but after you get up to this place (indicating), you can't see very far. There is a second curve there; that points to the right; there

is a bend there; after you pass this curve you can see across through there from that little bridge; after you pass the bridge it curves to the left, and you can't see much. The fireman on his seat can see, yes; the fireman can't see very far around that curve, but the engineer can; that is the second curve; the fireman can see just as plain as the engineer can after he gets around the curve, but while on the curve he can't. On the curve next to Thurber he can see a considerable ways; I can hardly state the distance; if there was nothing in the way, the fireman could see possible twenty car lengths; I would hate to make any estimate as to how many feet or yards the fireman could see from there without making measurements. I might make a bad mistake.

Cross-examination:

38 I stated that on the evening of the accident I started from Baird to go to Fort Worth with my engine and train; I started out ahead of Prater; he passed me at Cisco; I headed in on the side track at Cisco to meet No. 3, and Mr. Prater came down the main line and passed me. I saw nothing more of him until I got to Thurber; I don't know how long it was after the accident until I got there; I said I got there somewhere about 8 o'clock; it might have been later than that, I would not be sure about that; it is about eighteen or nineteen miles from Ranger to the place of the accident; if my records show that I left Ranger at 7:35, it would take me much longer than till eight o'clock to get to the place of the accident; the track was blocked when I got there; Mr. Prater's engine and caboose was there; and this caboose that he ran into—they were all there yet; the track had not been cleared; I don't remember whether I had turned my headlight on or not; I know where the yard board is; the yard board is just west of that little bridge—west of the place of the accident; the yard limit board was put there to caution the men coming in there to run slow and not to expect to be flagged. When you approach Thurber Junction—when you get to that yard limit board you are supposed to have your train under control so you can stop in a short distance, if you see the main line blocked or obstructed by anything; you are liable to find somebody there any time. After you pass over the trestle and approach on up to the switch, I usually reduce my speed to about six or eight miles an hour.

(Witness is shown blue print map of the yards.)

These are the "legs" of the "Y" and the track leading to Thurber. It frequently happens that trains come down from the mines and back down there; this is supposed to represent the yard limit board, which is west of the trestle, I don't know the exact distance.

It was agreed that it was about 1385 feet from the yard limit board to the place of the accident.

There is one curve back west of the yard limit board; there is a curve after you pass this trestle coming on up towards the "Y." The bow of that curve is towards the south—that is, the elbow of it;

it curves to the left as you come into Thurber; coming into Thurber from the west it curves to the left—outside of the curve is to the south and the inside is to the north.

Aside from the question of darkness, a man could see a considerable distance from the yard limit board—a man on the north side of the engine could see a considerable ways; I don't hardly think he could see as far as that switch; going around this curve I
39 don't know what would obstruct his view; I don't believe a man could see the switch, from this fact: Invariably when we come around this curve and call the fireman's attention to look out around there, he will hesitate a little while before he will tell you what he can see; that leads me to believe he cannot see as far as that switch. The engineer is supposed to be on the lookout all the time as he comes into these yards, and see down the track as soon as his range of vision comes into view. He dies not depend entirely on the fireman; he is on the lookout; he depends on the fireman in this way: The fireman can see a good real further than he can; the engineer is supposed to be on the lookout on his seat so as to catch the first object that comes into view. I have never made any observation from the trestle on up to the yard as to the headlight shining on the track; I never had occasion to pay any attention to it.

Redirect examination:

I was asked about cars running in here on the main track from Thurber: If a train was to come in on this main line from Thurber and I was coming in from the west with a train, if it was in the night time, I would expect to find lights on the rear end of it, and if it was the front end I would expect to find a headlight on the engine. I stated that the yard limit board was put there to caution us to put our trains under control expecting to find a train on the main line; if it was dark I would expect some red lights to be on the rear end of the train.

Recross-examination:

If it was day time I would not expect to find lights on it, because I could see it. You are expected to operate your train coming in so as to have it under control and stop it regardless of what the other fellow might or might not have on his train. You are supposed to come in there so you can stop without hitting anything; if I saw a man without any lights, certainly I would stop; you are expected when coming into junction points to guard against any possible accident.

Redirect examination:

Yes, Thurber is a regular stopping place for trains; nearly every train that stops at Thurber—comes from the coal mines, stay
40 there and do more or less switching on nearly every train that passes through there.

The usual rate of speed we come over this track where the accident occurred is six to eight to ten miles an hour; if there is nobody in the way the fireman says everything is clear up to the depot,

we pull up there; we can't run fast, because if you slow down around the curve it is a little uphill and you have to work steam to get up hill.

Recross-examination:

A great many trains are turned around at Thurber Junction.

H. K. FARNESWORTH, a witness for the plaintiff, being duly sworn, testified as follows:

My name is H. K. Farnsworth; I reside at Fort Worth; my occupation is that of switchman for the Texas and Pacific Railway Company. I am now in the service of the company; I have been in the service of the company since the second day of February, two years ago; I was in the service of the company on the second day of May, 1908. I was brakeman on the train to which Mr. Youngblood was engineer. I slightly remember the occasion of Mr. Prater's injury in an accident just west of Thurber Junction. I can't tell you where I was at the time of the accident, as I don't know the exact time of the accident. When I learned of the accident I was over at the restaurant—the eating house, run by the Chinamen.

(Witness is shown photograph.)

This is the restaurant; I recognize the surroundings there a little bit. This (indicating) is what is called the passing track that Mr. Youngblood's train that I was supposed to be braking for, was on. I guess it is about a block or a block and half from the west "Y" to the restaurant—three or four or five hundred feet, something like that. The only work I did there before going to the restaurant was to cut the crossing; I did some switching there, but that was after I went over to the eating house; I went over to the eating house and got called back; I was over at the eating house when I heard of the accident; before that time I hadn't had anything to do with the movement of Mr. Youngblood's engine or train. I threw
41 the switch to let the train out on the main line; I saw another train there on the main line; I saw one up about the depot and one further down east, just clear of the east "Y;" I saw one train on the main line up here (indicating) about the station; I don't know how far it extended down towards the west "Y." I didn't go down to the end of it; that was not the train that was ready to pull out; the train I am talking about was down at the west "Y." I don't know who was the engineer of that train; that was the train collided with; when I first noticed it, it was up here about the depot, right up in there some place (indicating) this is the depot here (indicating). It was moved back down beyond the west "Y," but I don't know when it was done; I know it was done but I don't know what time it was done. I threw the switch for Mr. Youngblood to clear the east "Y" *Y*—that as the purpose; Conductor Hale coupled up the crossing; he is here. I threw the switch under the supposition that his train would have to go on the main line, west, in order to clear the east "Y;" that train prior to this time had been standing up here (indicating); it backed down and cleared the west "Y"

switch; I can't say how far it was standing when I threw the west "Y" switch; the chances are I saw it, but I can't state how far; I didn't notice whether the headlight was burning or not; I don't know whether I saw any lights or not at that time, but I think I did. I was using my lantern—at that time I was using my lantern. I hadn't had occasion to use it before that. I don't know just how long I had been carrying it lighted—I don't know when it was given to me, I had a man give it to me; I don't remember where I was when he gave it to me. At the time I threw the switch, the conductor coupled up the crossing and we pulled down to clear the east "Y." I went down and opened the switch so we could get on the main line if he wanted to go. It was then just about good dusk, I guess. I mean by "good dusk," I could see an object about a block away; that is, the size of a house. If I had the sky-light on it I guess I could; I don't know whether it was lighter up there than it was down where the collision occurred or not. I don't know the situation very well with reference to timber; I was not out there very long—long enough to make thirty-nine dollars; it don't take long to make that much on the west end; I didn't work there after that; I don't know whether Mr. Youngblood's headlight was burning when I threw the switch or not, I don't remember noticing it; I don't know whether the train on our right, about ready to pull out had its lights burning
42 or not; I think the conductor had a light—I am pretty positive he had. When I threw the switch I didn't make any signals with my lantern; the conductor gave the signals from the crossing; the chances are I made a "move ahead" signal when I threw the switch for Mr. Youngblood. I testified in this case once before; my memory is not very good; I don't know whether I testified the other time that I gave a signal or not; I don't know whether I gave Mr. Youngblood a signal to go ahead or not; I don't remember, I conveyed to Mr. Youngblood the signal that the east "Y" was clear; I gave a stop signal with my lantern; I received a signal when the east "Y" was clear; it was conveyed to me with a lantern. I could see it where I was; it was a lighted lantern; I gave Mr. Youngblood a signal with my lantern to stop; we then backed up and cut the crossing and I closed the main line switch; then I went to supper; at supper I learned this accident had happened; I don't remember how I heard of the accident, I just heard of it; I guess some one came up to eat and I heard it from him. I carried my lantern with me to supper—I still had it lighted.

I don't know what time we got out of Thurber that evening; we went in from the east "Y" switch—headed in on the passing track or the east "Y" switch, going west. We had just been in there on the east "Y" switch long enough to cut the crossing, and I started over towards the eating house. I guess probably ten or fifteen minutes, when this movement I have described occurred. The first I saw of this train that was eventually standing down there with the engine about the cattle guard or a little below was when it was up close to the depot; I didn't see it when it moved up there; it was there when we got there, if I am not mistaken. I didn't see it move back at all; I heard it move back; I don't know where I was when it moved

back, I guess I was over there around the track somewhere. I had first gone to the restaurant before I came over there and threw the east "Y" switch; I had my lantern lighted when I first went to the restaurant; then I came back and threw the west "Y" switch. I can't tell you whether our headlight had been lighted before we went in on the east "Y" or not. I don't know whether the tail lights had been lighted or not, I never noticed; when we came in we immediately went in on the side track—the passing track on the east "Y;" then we cut the crossing and I went to the restaurant; when I went to the restaurant first, I had my lighted lantern with me; I don't remember when the lantern was first given to me; I have thought and thought and I can't remember.

43 I discovered this train up there on this track when we pulled in; some time between that time and when it was down here (indicating), it had been moved back. I told you a while ago I thought I heard it move back; I don't remember exactly whether I heard it move back or not.

Cross-examination:

Mr. Hale was my conductor and Youngblood the engineer. We left Fort Worth and got as far as Thurber, going to Baird. When we got there we went in on the passing track; I can't remember what time we got to Thurber; my memory is not good. I remember it was sundown, it was not dark, it was about dusk when we got there. I can't describe just how dark it was or how light it was; I paid no special attention to that; it was dark enough for a lamp to be lighted. I had my lamp lighted; the hind man lit it and gave it to me; we don't light the lights before sundown; we light them before it is quite dark as to have them ready; we don't wait until they are actually needed before having them ready. There is a time between sundown and dark when we have got to get ready for the future. If we were at a station and going out to make another run of eight or ten miles, say about sundown, at a station, and we were laying there for ten or fifteen minutes and knew we would want lights when we were ready to start, we would not wait until we left the station and actually needed them before lighting them.

When we pulled down on the passing track—I can't tell you how far Mr. Youngblood came down on the main line, I threw the switch; my memory is not quite clear; I saw this train that came in from the west, the caboose of which was supposed to have been run into, when it was standing at the depot, and I saw it after it backed down there; I saw it standing at the depot and saw it after it backed down there. I saw it standing at the depot; it din't clear the west "Y;" I notice that when I went over to the eating house. When I threw the "Y" here (indicating)—when I was down at this "Y" switch to let our train in on the main line, this train backed down to clear the west "Y;" I can't tell you how it was with reference to the cattle guard; that was before I saw it up on the main line. There was another train on the main line just clear of the east "Y;" standing about along there somewhere (indicating). I can't tell you how far back that caboose extended, I guess about

twenty or twenty-five car lengths. When I threw the west
44 "Y" Y the "Verney" train was standing down west of the cattle guard. That is the local, I am speaking of; then I threw the west "Y" switch and climbed on the car next to the engine so as to receive any signal from the hind man; I can't tell you how long I stayed up there—just long enough to pull down and clear the east "Y;" the engine was up close to where I threw the switch; it was in there just clear, about a car length; I can't tell where I was when I got up on the car; I gave a signal to stop when I received it from the hind man; I threw this switch and went down to the main line switch and Youngblood pulled down in here and I got on the car next to the engine, and when we pulled down I have a stop signal I received from the hind man; after the engine pulled down here, this engine came down here (indicating); after it got clear, then we backed up; we backed up and cut the crossing; I think I threw the switch and we went back, I am not positive. After that was done I went over to the eating house; I hadn't finished my supper when I heard of the accident; I don't know how long it had been when I heard of it; I guess it was about half an hour, I don't remember—twenty or thirty minutes, may be not so long; after I had supper I went down to the place of the accident; I didn't go as soon as I heard of it; I found Mr. Prater in the caboose; there were four or five, something like that around there, then; I am certain my lamp was lighted when I threw the switch—the main line switch; I know I took a lamp in my hand; I gave a signal with it; I can remember I had a lantern in my hand but I don't remember whether Verney's engine had a headlight burning or not when I saw it down there; I can remember what I have in my hand when I can't remember what somebody else has in their hand. I hadn't heard of the accident then—not when we were pulling down in the clear; I don't think I am mistaken about having a lantern in my hand—I am pretty sure I did. I don't know of anything that impresses me with that fact; I don't have a distinct recollection about some one lighting my lantern before we went in on the side track; I don't remember when I first got the lantern. I don't know whether it was before or after we go into Thurber. I don't know whether it was light enough to see the houses over in town when I went to the restaurant or not; I didn't pay much attention to it; I have no recollection as to that; I can't tell where the man was that was on the engine down on the ma-n [main] line; I don't remember seeing any of the crew connected with that train; I can't tell you how long the train was; I have no recollection or impression
45 as to how many cars there were; yes, it was as many as five cars, I can tell you that; I couldn't see down to the rear end of it, because it was on a curve. The switch on one side of it curves this way (indicating); I could see the engine from where I was. I can't remember whether it had the headlight burning or not; I don't remember whether Mr. Youngblood had his headlight burning or not. I have no recollection about the headlight.

Redirect examination:

I said the hind man gave me a lighted lantern; his name was H. A. Houston; he is dead.

W. L. STONE, a witness for the plaintiff, being duly sworn, testified as follows:

My name is W. L. Stone; I reside in Fort Worth; I have lived in Fort Worth three years. In May, 1908, my occupation was brakeman for the Texas and Pacific Railway Company. Mr. Prater was my engineer. Mr. Smart was the conductor. In coming into Thurber on the occasion of this accident to Mr. Prater, I remember where we first began to show our train lights—on the rear end of our caboose; we lighted the lights coming down Tiffin hill; that is about seventeen miles west of Thurber.

(Witness is shown plat.)

In approaching Thurber on that occasion, I was in the cupola of the caboose; Mr. Smart, the conductor and another brakeman named Adkins was in there with me. At the time of the collision it was dark; I had been keeping a lookout for lights and trains. There was a train standing on the main line in between the switches here (indicating) and with the caboose just clear of the "Y" with the tail lights lighted; they were burning when we approached this curve around here; this train was standing here that we struck (indicating); I saw no lights on it of any kind. Mr. Adkins, the rear brakeman, "hollered" is what first attracted my attention to the fact that there was going to be a collision; I then looked out and saw the caboose standing, possibly two car lengths from me and I got in behind, so if anything should happen to fly it would not hit me. Mr. Adkins said, "look out, we are into them." Mr. Adkins was on the inside of the curve; he just looked this way (in-
46 dicating) and saw the reflection of our headlight on the end of this caboose, and he said "lookout, we are into them." When I looked I saw the reflection of our headlight on the caboose. When we first discovered the caboose, we were running possibly six miles an hour, but the air went on just about the time that Adkins "hollered"—just about the time he "hollered" the air went on in emergency. I should say when Mr. Adkins "hollered," that the engine was about two and a half or three car lengths from the caboose.

I stated that we lit our train lights about 17 miles before we got to Thurber. It was getting dusk then. I don't think the train was going at a rate of speed exceeding eighteen or twenty miles an hour before we got inside the yard limits. I remember stopping at the water tank; that was at Strawn tank about four miles from Thurber; we had lights to stop the caboose at the tank in order to fill our water barrel; we all had lanterns at that point.

Cross-examination:

The accident occured between 7:52 and 7:55. When we went out the front end of the caboose, Mr. Smart and I, I asked Mr. Smart

what time it was and if I am not mistaken, his watch was 7:55 and mine 7:52; that was just after the collision; I jumped down out of the cupola and says, "well, it didn't do much damage," just like that, to Mr. Smart, and he made the remark that it was 7:52 or 7:55; I looked at my watch and to the best of my recollection it was 7:52 by my watch. That was just after the accident—just as we went out of the caboose.

I stated that we lighted our tail lights back at Tiffin hill—coming down Tiffin hill, 17 miles further back. We ran from Tiffin hill up to the place of the accident and also stopped at the water tank to take water; I said it was getting dusk when we put out our tail lights on the caboose, and we were using our lanterns; I think our average run was about eighteen miles an hour; I don't think it took us quite an hour to run from Tiffin hill down to the place of the accident. Yes; it is 17 miles and we had to stop and take water four or five minutes and fill up the tank and the water barrel; we lighted our tail lights about 6:50. I know the sun don't set until after seven o'clock; I know we put our tail lights out coming down Tiffin hill, seventeen miles back; we put them out seventeen miles back and then ran at the rate of seventeen or twenty miles an hour and
47 stopp-d a few minutes to take water, and the accident occurred at 7:52. I know it was dark enough to put out tail lights; we put them out just about sun down; it was dusk—getting dark and the lights were necessary. There is a time between sundown and dark that is called twilight; we are supposed to put out lights before they are actually needed, so as to have them ready when the time comes; the same way about lighting our lamps. I am not mistaken about its — dusk when we put our tail lights out at Tiffin hill; I don't think I am; if it took us fifty minutes to run from Tiffin to the place of the accident, that would be putting the tail lights out at 7 o'clock; it was right around 7 o'clock when we left Tiffin hill; it was then getting dusk; that is, sundown and dark enough for lights; it was sundown; the time card requires you to have tail lights out from sun down to sunrise; I have been railroading thirteen years; I am not now in the railroad business; I am running a saloon.

Mr. THOMPSON: Will you find that rule that requires you to have tail lights out between sun down and sunrise?

Mr. BOWLIN: I think it is Rule 8.

Mr. THOMPSON: Read Rule 8, will you?

The WITNESS: It is Rule 1, under the head of train signals: "Every engine running between sunset and sunrise will have a white headlight burning, and a red light in the signal box on rear end of tender, the light showing directly to the rear only."

Mr. THOMPSON: Do you find anything in that about having lights on a caboose?

A. Well, this rule I should think covers it.

Q. This says "Engine—"every engine."

A. That is standard rules.

Q. Every engine will have a headlight on the front and red light on the rear, from sunset to sunrise. You said there was a

rule that required you to have tail lights on the caboose from sunset to sunrise?

A. Yes; I was under the impression that was the rule.

48 Q. You railroaded thirteen years under the impression that the rule required tail lights on the caboose after sundown?

A. Yes, sir.

Q. That rule as to sunset and sunrise applies to engines?

A. No, sir; I believe there is another rule.

—. Yes; that is an arbitrary rule, made by the railroad company; they could make a rule to have them put on at 4 o'clock just as easy as at sundown.

We begun to slow up the train as we approached Thurber, about the mile board; that is the purpose of the mile board; we were then approaching the yard limits; the yard limit board is a caution to approach the yards under control, that we might, as we approached, expect to find the main line occupied at any time or any place; that is, in operating the engine or train we are expected to have it under control so that it could be stopped.

I was right in the cupola; I was riding with my back to the east—the same direction we were going—riding backwards; we had only a caboose attached to the engine. Brakeman Adkins was on the left hand side of the caboose; he says, "lookout, we are into them;" I just turned and looked through the glass on the righthand side or south side, and I observed the caboose standing two and a half car-lengths on the main line, from the engine; we were on a curve; I was not in a position to see the way we were in the caboose; our headlight showed on the caboose; I saw the reflection of the headlight on the west end of the caboose; Adkins discovered it before I did; just as I turned around, the air went on; the engineer must have discovered it, too, because he put the air on; I got off on the left hand side, at the front end; that would be the north side of the caboose; when I went to the front end I saw a man lying out by the side of the track, and I made the remark to Mr. Smart, "here is somebody hurt." That was Mr. Prater; he was comparatively at the foot of the dump; it was not a very steep dump; he was just about even with the front end of the caboose or the rear end of the tender; I don't remember that I noticed the fireman coming from the rear, walking up the track; it was light enough to see a man lying down by the track; you could see about that distance; I had a lantern in my hand and the reflection of the lantern would throw the light that far. I don't remember what kind of night it was with reference to being clear; I don't think it was a very clear evening, although I can't say; there was no moon shining; I don't know

what condition the moon was in at that time; I guess we were

49 there possibly forty minutes after we got the doctor; I don't remember who went for the doctor—some stranger, who knew where the doctor lived; I spoke about a car length; cars vary in length from 33, 34 and 36 to forty feet, and the draw bars; about 36 feet is an average car length. I figured two and a half car lengths we were from the caboose, that would be 36 feet to the car.

Redirect examination:

I stated I had been a railroad man for thirteen years. If there had been lights in the rear end of this caboose that we ran into we could have seen at something like about the mile board—probably just on this side of the mile board; we have a fairly good view at the mile board and can see the conditions that obtain; we can see quite a distance—we can see in time to slow the train down and stop for them.

We put out our lights at Tiffin hill—coming down the hill; we were on the east side of the hill; the country along there is mountainous; I can't say exactly what kind of a day and evening that was—whether it was sunshiny or not.

C. C. PRATER, being duly sworn, testified in his own behalf, as follows:

My name is C. C. Prater; I am the plaintiff in this case. I was 45 years old the 29 of last June. My occupation is that of a locomotive engineer; have followed that occupation for twenty-three or twenty-four years. I have worked for the Houston and Texas Central Railroad; I have worked for the International and Great Northern Railroad about eighteen years; I worked for the Texas Southern fourteen or fifteen months and from there I came to the Texas and Pacific. The first trip I made on the Texas and Pacific was on the second day of February, 1906. I was injured on the Texas and Pacific on the night of the second day of May, 1908, near Thurber Junction—west of Thurber Junction, I guess, something like half a mile.

I started from Baird on that day; Baird is 63 miles west of hurber Junction; we registered out of Baird about 4:20 p. m.; we were running as second ninety-two out of Baird; Engineer Weison left there as engineer of first ninety-two; I had orders to carry flags for third ninety-two, but when I got to Putnam
50 I got orders to take them down. I passed Mr. Weison's train at Cisco, thirty or thirty-five miles west of Thurber Junction. They had a full train, and went in on the passing track and we had only an engine and caboose, and we passed them at Cisco, and from there on we were first ninety-two, because we could make better time than they could. My engine was 162-ton engine. It is about fifteen feet from the bottom to the top of the boiler—that is from the ground; the dome of the boiler sits up on top of the boiler; I don't know just exactly the diameter of the dome; but it covers pretty nearly the full space of the top of the boiler. The boiler is thirty-three feet long from the head to the front end of the boiler. From my seat in the cab—from where my feet was to the top of the boiler is six feet six inches; there is a running board that extends from the cab along by the side of the boiler; it extends back into the cab and makes the floor of the cab; I sit with my feet on it; from the top of that running board to the top of the boiler is six feet and six inches. My height is something over five feet, I don't know how many inches; the sand-box on the engine sits in front of the dome—

I guess five or six feet in front of the dome; it is pretty near the size of the dome.

On the evening of the accident as we approached Thurber, it was getting about dusk, as we passed through Strawn; it was a little too dark to come through Strawn without my headlight burning; I turned my headlight on the other side; I had a short carbon to my headlight and I was trying to get to the tank to keep from turning on my headlight so I could put in a new carbon, and it was too dark to come through Strawn without a headlight, and I turned the headlight on until I got through Strawn and then shut my headlight down so it would cool off so I could put in a new carbon while the fireman was taking water, and turn my headlight on again. Strawn is four and four-tenths miles the other side of Thurber Junction. The water tank is about a mile this side of Strawn. I left the water tank about 7:38½; it was 7:38 when the fireman got through taking water; I looked at my watch just before he threw up the spout; then I slacked ahead for them to fill the water barrel and they took water in the barrel in the caboose. I put a new carbon in the headlight while the fireman was taking water; it was then so dark you couldn't see without a light any distance at all.

(Witness is shown a plat representing the yards at Thurber Junction.)

51 In approaching the point of the collision I remember reaching the yard limit board; I reduced the speed of my engine there, down to between six and eight miles an hour; I understand from the rule requiring that trains be under control that the train must be running when you come into a station or yard; so you can stop on a danger signal in a reasonable distance; that is what I understand; it is not to stop, but merely to reduce the speed of your train. As I approached the place of the accident my engine was drifting—that is, the steam was shut off and you come in around this curve there where it is under the hill, like that; you roll down that and then roll up—up about the switch the grade gets stiff up there—about the west "Y"; with an engine and caboose it will roll up along about that switch; heavy trains will roll further than the switch. You have got to work steam if the train gets against this, if you let it get down too slow. In approaching that place I kept a lookout as far as I could, looking ahead; I was lying out of the cab window all the time until I passed over the bridge down there; just as I passed over the bridge—that is my whistling place for the station, I dropped back in on my seat and looked straight across at the fireman and watched to see him—see if he was looking straight ahead, and then I reached up to get the whistle cord to whistle for the station, and just as I did that he says, "lookout, hold her, or something of that kind. I turned the whistle cord loose and jammed the air in emergency and threw my head to the right and just as I did I could see the right corner of the caboose; I turned and threw my legs around to the side of the box to slide off; it was something unusual to see a train out there without red lights or any flag, and I presumed some cars had got away and was drifting back

on me; the first I see, I see a brakeman run out of the caboose door and I saw the caboose rolling and I didn't wait any longer; I ran to the left to get off; just as I got hold of the handhold and went to drop from the first deck to the second deck, they struck. That is a two feet drop the first deck to the second deck, and as my feet struck the second deck the engine struck the caboose. I fell and my back struck the iron steps and as I went down it threw me out from the engine and I rolled kind of the way we were going down to the bottom of the dump. I don't think the head of my train could have been more than forty feet from the caboose when the fireman gave the alarm; I don't think it was over thirty or thirty-five feet between my engine and this caboose when I first saw it; I just could see the right corner of the caboose when
52 the brakeman ran out; it was then I think about twenty foot space between the engine and the caboose, when he ran out of the caboose door.

(Witness is here shown photographs of the surroundings at the scene of the accident and makes explanation concerning same.)

In coming around this curve at the scene of the accident, my position is on the right side of the engine and the fireman's is on the left; I could not have seen the caboose we ran into over the boiler from my position in the cab coming around that curve. The reason I couldn't have seen it was the boiler was over my head, if I was standing up. There are two windows to the cab; there is a front window and a side window—sliding window. I use the front window ordinarily in keeping a lookout. If it had been daylight I could have saw [seen] this caboose we ran into on that curve not over two car lengths, if that; I would have had to lean out the cab window on the side, over this way (indicating) to have saw [seen] it. At night under the conditions the weather was then and the darkness, I think I saw the caboose just as far as it could have been seen. I had my head right over against the cab when I put the air on and I just could see the right corner of the caboose. The reflection from the headlight caused me to see it when I did. The main rays of the headlight were shining to the right across the right of way; it was not on the track; that would flicker on the caboose; the headlight is stationary on the engine and does not follow the curve around. The boiler is on trucks just as the front wheels of a wagon, and when we come to a curve the boiler points straight ahead and the wheels of the trucks follow the curve. When I saw the brakeman run out of the caboose door I saw the caboose roll; that indicated to me that the caboose was drifting back or moving back; I felt positive the train was coming back on me, and do yet, and always will believe it was; I would not swear positively it was, because I didn't stay there long enough; I didn't wait to investigate to see if the car was standing still or moving; I thought my life was in danger; I thought it was a cut of cars drifting back.

(Here witness explains in detail his injuries.)

I don't remember how long I stayed there on the ground; I

noticed the state of the weather; it was cloudy—looked to
53 me to be thick cloudy; when I was lying on my back I was looking straight up; I had noticed that it was cloudy before I ever reached Thurber; it looked "threatening rain." They took me and put me in the caboose and laid me on a cushion and then they carried me up to the depot and put me in a baggage car and brought me to Fort Worth on passenger Train No. 6.

(Witness was shown photograph of a large engine, marked "Exhibit A," and asked to explain it.)

This is one of the large size engines; this is the same kind of an engine I was on; this is the mate to the one I was injured on.

(Witness explained his position on the engine, the front and side windows of the cab and all its parts.)

There is a window directly in front of the engineer and one to the side; the engineer can keep a lookout and usually keeps a lookoue through the front window, but in rounding curves he looks out the side window as far as he can—sometimes he *sues* the side window, not often.

(Here witness describes his physical condition and the length of time he was confined to his bed and the number of times visited by a physician, the extent of his injuries, etc.) Agreement with reference to the testimony concerning his physical condition will appear later on.

I am not physically able to run an engine; it takes a good, stout [man] to handle an engine. I suppose my average monthly earnings during the time I was engineer for the Texas and Pacific was about one hundred and forty dollars per month; it would average about that. I was a good, stout, healthy man before the accident.

I know about where the yard limit board is just east of Thurber; the east and west yard limit boards are something over a mile apart. At the point of the accident there is no other track there except the main line track; there is a hill on each side of the track and heavy timber. The track is rather under a hill there.

In coming on this curve where I was injured, west of mee [me] at my back, west, between me and sunset is what I call the canyon mountains; it is down grade; you drift from the top of the
54 canyon; if a man didn't try to stop his train it would roll up to Thurber; I drifted down hill all the time after I turned over the canyon. I never did roll a train into Thurber, but I have heard several engineers say they did. It is about sixteen miles back to where I started down hill—coming down the canyon. There is a considerable mountain on the right side of the track and a considerable hill on the left; I don't know whether these hills on the right would be considered a part of the canyon or not. You are coming through the hills all the time; it is about a mile back to where you come through this cut and drop down into this low cove place and after you pass into the yard limits, you roll down to that culvert; then you roll right up on the switch.

In approaching the place of the accident I didn't see any flagman or signal.

Cross-examination:

There are hills along to the right and to the left and heavy, big timber; I call the elevations along there hills: I don't know how far back you can see these hills; I said it was about sixteen miles back to where I started down the canyon. In approaching the yard limit board from the west up to the point of the accident I spoke of timber being on either side of the railroad; some of it is scrubby *time*, some of it is low; some of it stands up on that hill and is pretty high; I can't say how high it is from the yard limit board extending down across that trestle and on up to the point of the accident—I can't average the height, some of it is standing on the edge of the hill; I don't know how high the timber is along in two or three hundred feet of the railroad track. This photograph, marked No. 5, which shows the engine coming around the curve somewhere near where the accident occurred, represents the timber on the south side there; it indicates the height of it as compared to other objects. That timber is cleared quite a ways back from the track. Here is another view representing the scene from the trestle west of the accident; that also shows the character of the timber on both sides. It shows the track is lower and as it crosses the trestle it is up on a dump or fill. The track there is up on a fill; that would make the road that much higher above the general level of the ground on either side.

When the collision occurred I had gotten hold of the handhold and dropped down on the second deck of the tank, and they
55 struck just as I dropped down on the second deck; I was facing out; I had just dropped down from the first deck to the second deck just as it struck and it knocked my feet from under me. The force of the collision caused me to go out; my feet went from under me and my hand-holds broke loose from the hand-hold. My back went down and struck the second deck and my tail bone struck this foot iron; then there is *is* an iron step, I struck that step as I went down—I struck the bottom step. As well as I remember I hit the ground on my left side and then rolled right on down the dump, angling back the way I came.

(Witness is shown photograph of a large Baldwin locomotive and illustrated his position in the cab, etc.)

The headlight is on the front end of the boiler and the cowcatcher or pilot is ahead of that. The gang plank or running board extends from the cab out by the side of the boiler, to the end of the boiler. The cab window opens inside and comes back against this side window; the running board comes right into the bottom of the cab; I suppose the cab window is about five or six inches higher than this running board. This is the deck of the engine; there is a sheet iron apron extends from the engine to the tender and connects the two; there is where the fireman stands to work in firing his engine. The seat box is up here; from the seat box there is

quite a drop down to the deck of the engine; the deck is level with the foot-board of the deck in the cab where the fireman stands to work. There is steel apron that comes over from the deck of the engine to the tender so the fireman can stand there to do his work.

It is about six or seven feet from the back of the cab to the front window; there is a floor in the cab were [where] my feet rests, which we call the first deck; then there is a drop of about a foot and a half or two feet from the first deck which is on a level with the tender down on this apron where the fireman works; that is called the second deck. The front window of the cab is just about wide enough to admit a man's body sideways. I frequently went from the cab out onto this running board; it is made for the purpose of getting out there; the window is made for the purpose of looking through, and also to go out there if you have any business out there. When I am sitting on my seat in the cab looking straight ahead through the window, that carries my line of vision right along by the
56 side of the boiler. There is a sliding window on the side; I sometimes put my head out of the side window and look ahead.

I had gotten down off of this deck and on to the lower deck when the collision occurred; I had hold of this (indicating) hand-hold.

I started out from Baird as second ninety-two; at Cisco I passed first ninety-two on account of only having and engine and caboose and we then became first ninety-two. I never knew there was any other train ahead of us—the train Mr. Varney was pulling, until I got to Ranger, where I got signal orders; that indicated that I was second ninety-two -gain. I carried signals from there for third ninety-two, and Mr. Verney was first ninety-two. The order did not indicate who was running the first section—only gave the engine number of the first section; from Ranger on I knew there was another train ahead of me somewhere. I didn't see the train any time until I came around the curve. I knew that at Thurber there was a branch road extending to the mines some four or five miles; it was a common thing for trains to come in from the mines loaded with coal; they came down and set their trains out down there; these trains don't come out on the main line; they back out on the "Y's," but they always do it under protection. Yes, that is a common thing. Thurber Junction is also a place where they frequently turn trains—stop trains and turn them there; they do that right often.

I know where Tiffin hill is; I think that is about three miles from Ranger; it is something like 16 miles from Thurber Junction. I heard the testimony of witnesses here with reference to "tail" lights of the caboose being put out at Tiffin hill; that is what they said—that they put the "tail" lights out after they had turned over Tiffin hill. I think the sun was just about down at that time; I didn't look at my watch to see what time the accident occurred; I had fifty-five minutes to come from Ranger to the place of the accident. I suppose I consumed more than five minutes from Ranger to Tiffin hill; I should say probably eight minutes; it was not dark at Tiffin hill; it must have been about seven o'clock or a little after; our

orders at Ranger were O. K.'d at 6:55; we left Ranger at 6:55; it is about three miles from there to Tiffin hill. We run about three minutes to the mile, so it took us about nine minutes to get to Tiffin hill; that would make it four minutes after seven; I think that would be about right; I suppose we were four or five minutes at the water tank; I never looked at my watch when we stopped there. We left Tiffin hill at 7:04 and the accident occurred at 7:55, that
57 would be fifty-one minutes to run sixteen miles, less four minutes or five minutes consumed at the water tank, making something like forty-eight or forty-nine minutes actual running time. I passed into the yard limits at between six and eight miles an hour; before reaching the yard limit board I checked the speed to about six or eight miles an hour; I went along at that rate of speed until the accident occurred. I was looking ahead all the time after I passed the yard limit board until I passed over this little bridge there; that is about my whistling place for the station; I dropped back in my seat and looked straight across at the fireman to see if he was looking ahead; then I reached up to pull the whistle cord; I had my head out of the window all the time until I dropped inside to do what I told you. When I dropped inside I didn't look down through the front cab window, I looked straight across at the fireman; I certainly did have to look up to catch hold of the whistle cord; I looked at the fireman first when I dropped in, I don't know how many seconds it took; I had the headlight burning on my engine; that didn't throw the light ahead of the engine on that curve, it throws it to the right of the track—certainly it throws it ahead of the engine, but not on the track on that curve; if the track is perfectly straight it throws the light down the track. Yes, it was an electric headlight; that flares out, or broadens out; it does not throw the light more than thirty-five or forty feet—may- fifty feet, ahead of the engine. On a dark night I suppose the headlight would shine one hundred or one hundred and fifty yards, with the headlight focused right down on the track; I don't think it will show much further than that—that is only three hundred and fifty or four hundred feet; I think that is the full limit. I suppose you can see the rails something like one hundred yards looking out through the window on a straight track. No, sir, you can't see nearly a quarter of a mile; on a dark night the headlight will focus right down the track seventy-five or one hundred yards ahead of you.

I did not observe the degree of darkness as I went down there on each side of the track. I don't think a man could have read a paper that night later than 7:20; I would not say a man could not read a paper at that time, I don't believe he could, it was dark.

As soon as the fireman "hollered" I put the air on and then got down just as soon as I could get down; that is all I did with reference to stopping the train. When I threw the air on that clamps the brakes on.

Q. How far do you say that you were from the caboose when the fireman "hollered" and you looked?

58 A. When I looked?
Q. Yes?
A. Between thirty and thirty-five feet from where I could see the right corner of the caboose.
Q. From you or from the front end of the engine?
A. From me.
Q. How far does the engine extend in front of you?
A. I said if looked to be about thirty or thirty-five feet between the engine and the caboose; that is what I meant; not from me, from the front end of my engine. When the brakeman ran out of the caboose door the caboose rolled; I saw the brakeman come out; I didn't see him have any light; if he had had a light I would have seen it; I saw him by the reflection of my headlight. I saw him run out. I don't believe I could have seen the caboose any further back than I did. I just saw the right corner of the caboose when the fireman "hollered" and I threw my air on and threw my head to the right against the cab and I just could see the right corner of the caboose. I threw my legs around to get off the seat and as I did that I could see the caboose door, and I seen him run out. When the fireman "hollered" "look out," I looked through the front window of the cab and saw the corner of the caboose as I came 'round facing east I saw the brakeman come out of the door; the caboose seemed to be moving; I then turned back the other way and ran and climbed down to the point I have described—the way I told you. I was already turned this way (indicating) when I saw him run out the door. When he ran out the door of the caboose I ran to the north side; I was sitting on the south side—up in the cab; I was sitting right back behind the boiler; the seat box sits just a little back of the boiler head; the boiler head is a little in front of me—about opposite, rather. I jumped from my seat across to the left and ran across to the north side to get off. I didn't get off on the south side because I could get across there quicker. From the seat box to where I ran to the gangway is about seven feet. I struck the caboose at the rate of about four or five miles, or six miles, an hour—may be five miles an hour. I was hardly forty feet back when I put the air on; it couldn't have been over forty feet from the caboose. I claim it was dark and the reflection—the reflected light shone on the caboose. The brakes on my engine were in fairly good working order.

Redirect examination:

59 (Witness is shown document.) This is the time-table containing the rules. There was no other rule—general rule or custom, from the printed rules—none that I know anything about, after we got inside the yard limits. The place where the accident occurred was not a regular stopping place for trains. The regular stopping place would have been up at the station, between the switches.

I made some measurements of the distance there. It is 1575 — from the west main "Y" to the east main "Y," on the passing track, on the track Mr. Youngblood's train was on. The station is nearer

the east "Y" than the west, I think—there is not much difference. It is 850 feet from the west "Y" to the point of the collision; from the point of the collision to the bridge, or trestle, it is 640 feet.

I made a test on the second day of May, 1909, as to what time the sun set; when I made the test I was up in the Elks' building, in the fourth story, here in Fort Worth; it was a clear evening. I went to Mr. Mitchell's where all the railroad men get their watches tested and got railroad time. The sun set on May 2, 1909, in the old Board of Trade, Elks' building here in Fort Worth, on the fourth floor, at 7:11.

(Witness is shown Sub-division 8, of the Rules under the head of "Standard Signals.")

Q. Now, at the time of this accident did that rule apply where a train was stopped away from the main station within the yard limits, at the station of Thurber—that rule as it is there?

A. Yes, sir.

Mr. THOMPSON: We move to exclude the testimony, because the rule is not offered. I move to exclude the testimony unless the rule is offered in connection with it.

Mr. WYNN: If we don't offer the rule it becomes immaterial.

The COURT: I will hold the ruling on your motion in abeyance, and keep it in mind.

Recross-examination:

In these rules under the head of "Train Signals," in the third column on the same page as this other rule referred to, it
60 says: "Every engine running between sunset and sunrise will have a white headlight burning, and a red light in signal box on the rear of tender, the light showing directly to the rear only." That was the rule in force at that time with reference to the lights on the engine.

"2. Every passenger train will have a bell cord attached to the bell in the cab of the engine, passing through entire train and secured to the rear end of the last car; and they will have a red light on rear platform of last car between sunset and sunrise. All other trains will have a red flag on each side of the last car, in day time, and a red light on each side and one in the center of last car in train at night."

Those two rules which I have read, are rules 1 and 2, of this timecard rules. Of course we all understand that in day time we don't have lights; but at night you are supposed to have them; that is an elementary rule in railroading.

Q. Now, if in leaving a station say five or six or seven, or even, ten minutes before the time you should have your lights out—you understand that?

A. Yes.

Q. And have to run eight or ten miles, or more, is it not a fact that it is the practice and custom, upon leaving a station to put the lights out even though it is a few minutes before time—absolutely required to have the lights out? Is not that frequently done?

A. No sir, it is not the custom.

Q. You say that if a man was leaving a station—say Strawn out there, and he knew it was necessary to have tail lights on the caboose, say at 6:40 and it was then 6:35, and you were standing at the station there to meet a train, and getting ready to go out, that it would be customary, or the practice to put the lights out and have them ready, rather than [wait] until the train gets out and then have a man try to light them while the train is running? Do I understand you to say they wait until the very time, out between stations, in preference to doing it before starting?

A. Why, yes, I always wait until time to turn my headlight on.

Q. The headlight is very easy to turn on?

A. Yes.

Q. I am talking about the tail lights on the caboose?

A. I don't think it customary.

61 Q. They wait until the very hour—or very minute?

A. Yes, they wait.

Q. Even though it should be between stations?

A. Yes, wait until sundown, is about the way I always generally notice them putting them out. I am not always back in the caboose. I have seen men light their lanterns and have them ready before it was dark enough to need them; I have seen them light them and put them in the caboose; I have seen them light them and put them in the caboose about sundown.

We left Ranger that evening at 6:55—nineteen miles from the place of the accident. When we got to the water tank we stopped and took water; we left there about 7:38; it was three miles from there to the place of the accident; I turned my headlight on west of Strawn. I came on and when I got to the yard board limit approaching Thurber Junction I put my train under control. I looked out from my side to see if the track *to see if the track* was clear down to the depot. I did not continue to look that way all the time until the accident; after I had crossed the bridge I did not. From the yard board limit down to the bridge I looked continuously ahead; I was lying out the side window looking as far as I could; after I crossed the bridge was the first time I took my vision away from looking out ahead of me. I can't say just what space of time I had my vision away; I turned and looked across at the fireman but that didn't take but just a short space of time, I don't know just how long; my reaching up to pull the whistle cord didn't take but a very short time; I had reached up and caught hold of it—I had raised up off the seat; I immediately looked ahead and discovered the corner of the caboose and I was in thirty or thirty-five feet of it—I suppose may be forty feet, when the fireman "hollered." I put the air on first and then threw my head over to one side—when the fireman "hollered" I jammed the air on full—that is all I could do; then I threw my head to one side and saw the corner of the caboose. The darkness and the curve prevented me from seeing this caboose between the Yard Limit Board and the trestle—the darkness and the curve both prevented me from seeing it at the trestle. If it had been daylight or sundown—before darkness I could not have seen the

caboose from the trestle looking out from my cab. I could not have seen it in the day time; I don't believe I could have seen that standing caboose over two or three car lengths if it had been day time, in coming over that trestle up there. An average car length is
62 about 30 feet; that would be sixty to ninety feet, somewhere along there—sixty-five or seventy feet. Even in day time looking ahead out of my engine there on my side I would have had to go in sixty or seventy-five or ninety feet of it before I could have seen it, on account of the curve. I could not have seen it back one hundred and fifty or two hundred feet, back at the yard limit board. When I passed the bridge, or trestle, it was dark, or dusk. My headlight was shining; the purpose of that headlight is to throw a light ahead of me so I could see. On a straight track within a limited space you can see as clearly at night as you can in day time, with your headlight shining. If it had been a straight track and nothing to obstruct my view, with the headlight shining I could have seen that caboose from the trestle up to that caboose; I could see the caboose as soon as the headlight shone on it. The headlight might have *shown* on the caboose and be over around this long boiler and I could not have seen it. From the time I came in view of it in daylight on the same track with my headlight shining on it I would also come into view of it in the dark.

I stated that I had my train running at six or eight miles an hour when the fireman "hollered." I put the air on in emergency. I think on that grade with an engine and caboose I could bring it to a stop within seventy-five or eighty feet, running at six to eight miles an hour; that would have been a good stop; if my attention had been called to the standing caboose when we were one hundred and twenty-five feet from it running at the rate of speed I was I could have put on the air and stopped the engine before it struck the caboose. Certainly I could have stopped the engine if my attention had been called to the standing caboose when it was one hundred and fifty or two hundred feet away before it struck the caboose. It is a fact that I was discharged from the service of the company on account of this accident—that is what they said. It is a fact that the position of engineer, handling a train, is a very responsible one; an engineer should be extra careful.

I understood from that yard limit board there, that under the rules and custom, when I reached that point I should have my engine and train under control and that I should approach that station from that territory expecting to find a train occupying the main line at any point between the yard limit board and the station; I understood that that was the very object of having my train under control, so I could stop within the range of my vision—if reasonably flagged.

The length of an engine and tender is about forty-five or fifty feet; the tank is about twenty-three feet. I don't remember
63 that I testified on the last trial that the tank was 33 feet, I think that is the boiler and engine; I think the boiler from the boiler head where I sat to the front end is thirty-three feet and the tank is twenty-two or twenty-three feet. That would make about fifty-five feet for the total length, from the rear end of the tender to

the front end of the boiler; that would not include the cow-catcher.

I said this caboose was not standing at a regular stopping place; I meant by "regular stopping place," the depot; no, it was not a common thing and frequent occurrence for trains to stop back there where this caboose was.

I stated that I made some observations with reference to the setting of the sun on the second day of May, 1909, one year after the accident, here in Fort Worth, and that the sun set at 7:11. I mean by that there was nothing visible of the sun at 7:11; it had disappeared from the horizen; I took that observation from the fourth story of a building here in Fort Worth.

It was admitted by both parties that the sun set at the same time on the same date in 1908 and 1909, and that there had been no change in standard time.

Redirect examination:

I stated that I would expect to find a train standing on the main track at any time, but I would expect to find red lights on the caboose or be flagged a reasonable distance; if after dark either would have prevented the accident.

With reference to trains backing in on this west "Y" from the coal mine—from Thurber: That is covered by rule number eleven under the head of "Rights of Trains."

Plaintiff offered in evidence Rule No. 11, under the head of "Rights of Trains," which reads as follows:

"11. When trains are to meet or pass each other, the train having the right to the track will occupy the main track between the switches, and the train having to take the siding will go in at the nearest end, and not run by to back in; but, if obliged from any cause to pull up and back in at the farthest end of the switch, a man must first be sent ahead a sufficient distance to flag approaching trains. When necessary to put the ruling train on the siding, the man must be sent ahead far enough to stop the train before it reaches the first switch, and until this train arrives and stops, the non-ruling train will lay back a sufficient distance to guard against all possibility of accident."

64 I construe that rule as applying to a train that might back down west off the Thurber Junction "Y" in the yard limits.

Mr. THOMPSON: Tell me how you construe that rule as applying to a train that might back down the west "Y" in the yard limits?

A. I construe it just the same as the car reads; they have no more right down there than any other train.

Q. This has reference to trains meeting or passing each other?

A. Yes.

Q. Suppose there is no train in sight at Thurber Junction at all and a train should be coming down from Thurber loaded with coal and wanted to back down west on the main line to meet another train there—pass another train there, then this rule would not apply?

A. The time card makes a ruling on that; they railroad expecting a train to come on to them at any time.

Q. Yes? This is within the yard limits at Thurber Junction?

A. Any place on the main line; it says "Any place on the main line."

Q. This rule No. 11 don't say anything about that?

A. No, but there is another rule.

Q. You would expect—if a train was backing that way you would expect a flagman to be sent back?

A. If it was down there at all, a flag should be sent back, under that rule.

Q. Rule No. 11 says "When trains are to meet or pass each other, the train having the right to the track will occupy the main track between the switches, and the train having to take the siding will go in at the nearest end, and not run by to back in; but if obliged from any cause to pull up and back in at the farthest end of the switch, a man must first be sent ahead a sufficient distance to flag approaching trains." That rule applies to trains meeting each other.

A. It says "Trains between switches."

Q. I mean at stations?

A. It was not between switches, it was 850 feet west of the switch.

Q. But within the yard limits?

A. The yard limits does not protect me.

Q. Does it not protect you to this extent—the purpose of the yard board is that you are to approach them expecting to find a train there anywhere?

65 The COURT: He has gone over this, I don't see that Rule No. 11 has any application here.

Dr. I. C. CHASE, a witness for the plaintiff, testified as to having treated the plaintiff and to his condition and the extent of his injuries.

It is agreed that the plaintiff, C. P. Prater, testified fully with reference to the injuries received by him growing out of the accident, as shown by the testimony, and it is further agreed that the testimony of plaintiff tended to show that he received substantial physical injuries and that in a sufficient amount to uphold the verdict rendered by the jury; and further that the witness, Dr. Chase, also testified with reference to the injuries of the plaintiff and that his testimony likewise tended to show that the plaintiff received substantial physical injuries to an extent sufficient to justify the verdict as to amount, and no question is raised by the defendant, or will be raised, on appeal, as to the verdict being excessive.

A. T. SMART, a witness for the plaintiff, being duly sworn, testified as follows:

My name is A. T. Smart; I reside now, in Chickasha, Oklahoma. In May, 1908, I lived in Fort Worth, Texas. I was engaged in running a train on the Texas and Pacific Railway and braking; I was conductor on the extra list—braking and running extra; during the

panic they had pull- off a few of the crews and that put me back on the extra list.

I went to railroading in 1886, as I remember it—about eighteen or nineteen years ago. The most of my railroad work was for the Rock Island. I was running a train as conductor when Mr. Prater ran into a caboose. We left Baird that evening at 4:20, as second ninety-two; we had an engine and caboose; if I remember right we made five stops between Baird and Thurber Junction. The first stop was at Putnam; the second at Cisco; there we met No. 3, and the third stop was at Eastland, the fourth at Ranger and the fifth was at the water tank just west of Thurber. We were delayed about sixteen minutes, I think, at Cisco. We left Cisco between 6:05 and 6:10 or 6:15; we got to Cisco at 5:55; we passed No. 3 there; the accident occurred at 7:50. I know that, because I looked at my watch
66 immediately after I hit the ground; we have got to tell the time when an accident happens on the road; we have to make reports of accidents and I always practice that—after I got out on the ground the first thing I did was to look at my watch, before I even discovered where Mr. Prater was; at that time it was dark. We put out our lights coming down the canyon between thirteen and fourteen miles back from Thurber. We came in under control—between seven and eight miles an hour, when we came by the mile board.

When I first received warning that an accident was about to occur we were running between five and seven miles an hour, I should judge. We were drifting along—I mean by that, not working steam. He had used his air coming in to get the engine under control; he slowed down and kicked his brakes off and it was down hill and would pick up again of course; the first warning I had of an accident the brakeman said "lookout, he is going into that fellow." I straightened up to pull the air, but he put his air on, I judge two or three rail lengths before he hit the train, and my report shows we were running three or four miles an hour; that is what I said in my report at the time of the accident; that is what I said at the time and what I want to say now positively. I don't think the engine moved any at all after it hit the caboose; I think it stopped still, right in a foot or so. After I stepped on the ground—I heard the splinters flying—I stepped on the ground and walked immediately to the pilot of the engine; then I turned back and heard Mr. Prater making this noise, and I don't think the engine moved at all. I made careful inspection of the accident after we cared for Mr. Prater. The pilot was torn from the engine—mashed down; the braces between the pilot—the slats in the pilot—were all broken loose from the iron plate it was fastened on; there were three or four braces broken. The headlight was still burning. The caboose was off center; the back end of the caboose was torn in; I mean by the caboose being off center, the hind pair of trucks was off center; the steps were knocked off the caboose; the front end of the platform was drove into the box car in front of it, and the box car—one pair of trucks was off center—the right hand pair of trucks on the box car. There were no trucks off the rails—no derailment. The first warning I had that there was about to be a collision was when Brakeman Ad-

kins "hollered" "Lookout, he is going to hit that fellow," or "he is going into that fellow." I raised up to pull the air and as I did that he slapped on the air. I got out of the caboose, and got out
67 quick—just as quick as I could.. There were no lights on the caboose we ran into. There was no flagman out to warn approaching trains. If there had been red lights on the rear end of this caboose we struck the engineer and fireman ought to have seen them a quarter of a mile back. I had been looking forward before I got this warning—looking towards Thurber. I saw two red lights on a train ahead of this train we hit; that train was inside the switches, standing up above the switch where we head in on the "Y." (Witness refers to plat.) This (indicating) represents the west "Y." The train I saw the red light on would be standing up here (indicating). I don't know how far back I saw these red lights. I saw them quite a ways back; we had been talking about what we would do when we got to Thurber; we saw a train on the passing track and a train on the main line; we saw a train standing on the passing track with its headlight burning, facing west; the train we ran into was between the train I saw and my train; the train we ran into had no lights on it; just before the collision occurred *the collision occurred* there was a stop signal given on the north side of the train; when I started out of the cupola I saw a stop signal—somebody gave a stop signal with a white light; it was on this side of the train (indicating). I couldn't tell whether it was opposite the engine or ahead of the engine; I couldn't tell whether it was on that side track or not, it was on this side of the engine (indicating). I don't know where that stop signal was given—I don't know whether it was given with reference to the train we ran into or not; I didn't think much about that signal—didn't ask any questions. I remember seeing this signal very distinctly. A stop signal is to take a lantern—an ordinary white lantern—clear glass, and turn facing the person and swing it crosswise.

I stated that after I got on the ground I heard splinters flying; that was the rebound of the collision, I suppose, the engine hit the train—flying from the end of the caboose or the boxcar; also the pilot slats; the slats of the pilot were cracked. I had seen no sign of this train we ran into at all before I got the warning.

The headlight of Mr. Prater's engine at this point would have shown straight across there (indicating); you understand we were on a curve; the headlight of course would go straight across—would not follow around the curve; I don't know how far the headlight would show on the rear end of that caboose; I didn't think much about that. I don't think you could see very far; I don't think the headlight helped you see that standing train there in the
68 dark with no lights on it. After I got out of the cab I walked down to the pilot of the engine and saw the damage and turned and came back; when I got out of the caboose I heard Mr. Prater and I came right back to where he was. I saw the rear brakeman of this train there then; I believe his name is Barger; he came around from behind my caboose; when I turned and came back, he came around and walked around from behind my train; he evi-

dently got off on the right hand side; he had a lamp in his hand; he hadn't seen or talked with anybody else about this before he met me. Stone was there, he followed me right out of the caboose; Stone was turning down to where Mr. Prater was and I heard Barger come walking around; he saw us both at the same time; this was immediately after the accident happened; he had time to get off and walk around; I got off and walked around to the pilot and came back; I didn't see him get off; I didn't see him jump from the car.

After we got Mr. Prater in the caboose I went down to the office; I got down to the office about 8:30. The local engine came down for the train about 9:00 o'clock. I was there when they got the train and left the two cars.

In passing down I noticed that this engine of the train we ran into was west of the west "Y" switch about twenty-two steps; I didn't step it; the engineer stepped it and spoke what number of steps it was—twenty-two steps west of the west "Y" switch. I stood there in the steps while it was stepped off.

The first I saw of Mr. Verney, I met him west of the west "Y" switch coming down from the office; I saw him on my way to the office; I staid down there ten or fifteen or perhaps twenty minutes after the accident; he was coming down from the office—coming down the track; I met him right at the "Y" switch. If my recollection serves me, no one was on the engine of the train we ran into as I went by at this time.

The rules provide that the engineer shall have his train under "control" in coming into stations or water tanks. I understand by having an engine under "control" means that you must approach any point on the main line expecting to find the main line occupied by another train, or, what I might understand by being "under control," in case you are flagged, you can stop your train. If you come into a station or water tank and find a train taking water you come prepared to stop, in case he does not get out of the way so you will not run into him. "Control" means you can stop your train. Mr. Prater had his train under control sufficient so if there had been any warning we would not have hit him.

69 In my experience as a railroad man and working for the Texas and Pacific Railway Company and my observation of the rules and custom of the company I would not have expected this train there at that time without red lights on the caboose. I would hate to stop my train around and let them hit me if I was in the yard limits and they would not say anything to me; it has been my experience that a flag protects my train—that a flagman protects my train; I sent a flagman back that night. I don't know how far out of Thurber this board is that they call the Yard Limit Board. We were in the yard limits.

Cross-examination:

I was discharged on the 21st day of May; my clearance states it was on account of this accident. Yes, it is a serious thing for a train to hit another train.

We left Ranger at 6:55; it was nineteen miles from Ranger to

Thurber Junction, and we hit this train at 7:50; we took water at the tank; that took us three or four minutes; that made fifty-two minutes to run from Ranger to Thurber—nineteen miles in 52 minutes. Part of that time was used to come in—we slowed up—we came into Thurber under control; we came around the curve this side of the bridge and slowed up, which consumed some of the time. There was a bulletin on the board allowing us—allowing engineers to run twenty-five miles an hour; he could run twenty-five miles an hour—it was wholly up to the engineer, to his judgment; if the track was safe he could run twenty-five miles an hour.

Q Is it not a fact that just before that you had had heavy rains and the track was unsafe?

A. At this time the track on an average was in good shape—at this time. There were slow places; but a man could get over slow places with an engine and caboose and begin running again in a little while.

We left Ranger at 6:55; we stopped to get orders and got right out. We slowed down coming around the curve before we got to the yard limit board. I judge we were running six or seven miles an hour when we got to the yard limit board; that is where the engine was drifting. We were running five or six miles an hour when I got the first warning; of course when we hit this car our brakes were taking hold; it is a part of my duty as conductor to regulate the speed of the train; the speed of the train was regulate- to my satisfaction at that time. It is a part of my duty to see that the
70 engineer does not run too fast. I was riding on the right hand side of the caboose in the cupola when we reached the yard limit board, facing east—the same direction the train was going; I saw red lights on a caboose between the switches as we passed the yard limit board, when we came in sight of Thurber; there was a train standing there with the headlight burning, there on the passing track; my vision was clear enough to see this. There was a train on the main line between the switches; I knew it was between the switches; I am familiar enough with the track at that point to know that and besides the train was standing there when I went up to the engine. That was an intermediate train between the switches; I saw no part of the train we hit until we hit it. I called it dark at that time—it was cloudy—it was a cloudy evening; it was dark in the timber; I don't remember seeing any stars; I can't swear as to whether the moon was shining or not; at that time it was dark; when we came through Strawn it was quite dark; it was about 7:30 or 7:35 when we left Strawn; it is about a mile from Strawn down to the water tank. I call it dusk while we were at the water tank. I could see an object out from the track; it was not pitch dark when we reached the water tank, it was getting dark; yes, it was pitch dark when we struck the caboose. It was dark—in between the timber—and cloudy, and really made it appear darker than it was. I don't know how far I could have seen with the naked eye; I never tried; I couldn't see very far, because this train was standing there—this train was standing around the curve—the train we hit. You couldn't see very far for the curve. If I had been

walking on the track and no train between me and this train we hit, possibly I could see the bulk of something there possibly six or eight car lengths; a car length is 36 feet, some forty feet. You could not have seen further than six or eight car lengths; I don't believe you could have seen further than that, if that far, that particular night; it was dark in the timber there; yes, there was timber where this caboose was standing. I don't know how far away from the track; I don't know if they have 100 feet on each side of the trains or not, I guess they have 200 feet there. I can't testify as to whether the stars were shining or not. You might have seen a buggy, or an object coming up a straight track there at that time, I don't know that you could see it "quite a distance;" you could see it six or eight car lengths, I should think.

Q. Don't you think you could see a whole train a considerable distance?

71 A. I never saw a whole train a "considerable distance." The purpose of slowing the engine down at the Yard Limit Board was to get the engine under control, I suppose; it was under control coming into that town, as we always do. The first thing that attracted my attention to the fact that there was about to be an accident was when Brakeman Adkins called my attention to it. He was sitting on the left hand side as we went down and I was on the right hand side. He said "look out, we are into that fellow." I straightened up and reached for the air and he slapped his air on; he put the air on before I got hold of it; then I saw the lamp signal on the left hand side of the train we hit—I saw a white signal—a stop signal on the left hand side of the train we hit; I then dropped down on the floor of the caboose. If I remember right, when the collision occurred I had gotten hold of the caboose door—was opening the caboose door; I can't say positively, because I felt no jar—I felt the air take hold; I didn't have to climb down at all; I just dropped down on my feet and walked to the door—about two steps. I had gotten to the door and had gotten hold of the door when I felt the stop, I didn't feel any jar; I then got off on the left hand side and walked up to the head of the engine. I didn't see the fireman on the engine; I didn't see Mr. Prater until I came back; I went to the pilot of the engine and then came back; Mr. Prater was down on the side of the hill at the opposite corner of the tank, where the caboose and engine came together—coupled together. The fireman came from the opposite side of the train; he showed up—I seen him after I went to the pilot and walked back, the fireman came walking around to where Mr. Prater was. That is the first I seen of the fireman. I got off at the rear end of the caboose and walked up on the north side; that is the side the fireman rode on; I didn't see him anywhere between the rear end of the caboose and the front end; he was not there when I got off. He showed up from towards the rear, I don't know where he got off. I can't tell you the length of an engine. This white light that I saw was on the left hand side of the track of the main line up near the switch that goes into the "Y." I saw that as I was leaving the caboose—as I was leaving the cupola, when I went to swing down like that (indicating). I don't

know how long he had been signaling; he just gave a stop signal. If he had made any signal before that I would have seen it; I was looking ahead; he was on the ground when I saw him give this signal. Yes, I think I would have seen him if he had been on the rear platform of the caboose that we ran into; I think I would
72 have seen him looking across the curve. My judgment tells me I would have seen this signal; I would have seen this white light. I don't know how far the engine was from the caboose when I saw this white light—two or three rail lengths; a rail length is something like thirty-three or thirty-four or thirty-six feet—something like sixty or sixty feet, I suppose, it was west of the point of the accident I saw this signal given by this man. The man I saw give the signal was away up at the "Y" switch; he was still up ahead—not this train we hit; he was not down at the rear end; I didn't see anybody there at all. The man I saw give the signal up ahead was the man braking ahead for Hale—Mr. Farnsworth; he was with this train on the passing track. My train was second ninety-two; Verney's train was first ninety-two. The man who I saw give the signal was not with this train we hit, he was with this train on the passing track—nobody connected with the first ninety-two.

(Witness is shown written instrument.)

This is my signature; I signed this statement. "I saw the brakeman on first ninety-two give a stop signal before we hit the caboose." That means just what it says; the brakeman that gave the signal made the statement; I learned that he was with Hale's train; I thought he was the head brakeman at that time; I thought he was the head brakeman of first ninety-two, but I learned afterwards it was Mr. Farnsworth; when I made that statement I didn't know who it was gave the signal, but I found out later it was Farnsworth. I never told who the brakeman was that gave the signal; the signal evidently was given by a brakeman, and as I say, I learned who it was later on. I don't know how long it was after the accident that I found out better. I made that sworn statement several weeks after the accident, I can't tell the exact time.

It is the purpose of the yard limit board to apprise engineers of the fact that it is necessary to regulate the speed of their trains—that they are expected to find a train anywhere on the track within the yard. If it is night and a train is within the yard limits and has red signal lights out and should stop, I evidently would expect some one to go back and flag. I agree with you that the yard limit board is for that very purpose—that the yard limit board is placed there for you to approach expecting to find a train on the main line on coming into Thurber; going east and stopping right inside of the yard limit board right around the curve, you have no warn-
73 ing. The yard limit board is a caution signal; yes, in one sense it is a caution signal as much as a flag. It is a fact that you are not only supposed to rely upon the other fellow, but you are expected to operate your train expecting to find a train there and have your train under control so you can stop; that is what we were

doing at this time. It is a fact that if it is in the day time you would expect to see a flag on the caboose, and if it was dark enough you would expect to see signal lamps.

Redirect examination:

I don't know of any rule or custom of the railway company at that time, or prior to that time, by which I was required, in approaching the scene of the accident, to have my train under control so as to have time to stop and prevent running into a train that was backing back there on the track without any lights or a flagman being sent back.

I stated that Mr. Ward discharged me on account of this wreck.

STANLEY BOYKIN, a witness for the plaintiff, being duly sworn, testified as follows:

My name is Stanley Boykin; I am 27 years of age; my profession is that of a lawyer. For five years I was in the Government service in the Weather Bureau; I began when I was seventeen or eighteen years old; I attained that degree of proficiency that I was placed in charge of a station as observer on the south coast of California, out in the waters of the Pacific Ocean.

On the second day of May, 1909, I was at Thurber Junction, Texas; I made some observations as to the time the sun set; I made my observations at a point a few yards west of the station platform—just at the edge of the public road crossing, on the north side of the track; the atmosphere was perfectly clear; the horizon was clear except that it seemed to be obscured by some low mountains. I should think the mountains were fifteen or twenty miles away—something like that. I observed two ranges of hills; the track seemed to go between the hills.

I had just an ordinary Ingersoll watch; I regulated it with the time at the station at Thurber just before I observed the sunset; the sunset at 7:14.

74 Cross-examination:

That was on the second day of May, 1909; it was on Sunday; we were all out there together. I was up at the station at 7 o'clock and watched the sun go down; there were some hills out just west of the yard limit board—some low hills; I mean by sunset, when the center of the sun is on the horizon; that means that half of the old man was down and half up.

C. C. PRATER recalled by the plaintiff, testified as follows:

Q. What kind of brake shoes were on your engine, new, or old?
A. They were old, cast shoes, partly worn—pretty badly worn.
Q. Now, in putting on the air——

Mr. THOMPSON: We want to be understood as objecting.

Mr. BOWLIN: Is there any perceptible length of time after you put on the air until the brakes take hold, as you call it?

A. Yes, there is some time. When you make an application of the air you have got to draw off from your train line so as to reduce the air before the brakes will set; I forget exactly, it is in the book of rules, it is a second or so—two seconds and a half, may be a little longer, before the brakes will take hold. The brake shoe does not hold—cast shoes, until some friction—heat, gets on the shoe and tire of the wheel. The chilled steel shoes take hold right at once; it is harder than the tire on the wheel of the engine and takes right hold.

Cross-examination:

Mr. THOMPSON: You have stated that the braking apparatus was in fairly good order?

A. I stated that the brakes were fair.

Q. About such as were usually used?

A. Yes, cast shoes, is what they generally used.

(Plaintiff rests.)

75 BROOKS BAKER, a witness for the defendant, being duly sworn, testified as follows:

My name is Brooks Baker; I live at Fort Worth; I am a surveyor by profession; I was at one time county surveyor of Tarrant County. I remember on the second day of May, 1909, of going out to Thurber Junction with you (Mr. Thompson, attorney for defendant), and some other men to make some measurements with reference to the scene of the accident that is said to have occurred there the year before. The second of May, 1909, was on Sunday. Mr. Bowlin (attorney for the plaintiff) was out there the same day. I had pointed out to me the place where the accident is said to have occurred—where the engine is supposed to have run into a caboose, and a man named Prater was said to have been hurt, just west of Thurber Junction. I remember where the trestle is up on the railroad track west of the point of the accident. I remember the yard limit board. I walked down to the trestle with some gentlemen that evening; we started from the station about seven o'clock in the evening; we walked west from the station passing the scene of the accident and continued west across the trestle and stood about near the trestle until sunset; the sun went behind a hill just west of the point in controversy and it is covered with timber and as near as I could judge the sun set about 7:18 or 7:20. I was requested to make an accurate observation of the setting of the sun and the degree of light; I noted it in my book. A little later, about 7:40, after the sun set, I was able to read a copy of the Dallas News want ads. The light was from the sun, the moon was not shining visibly then.

Cross-examined:

In stating that the moon was not visible, my *my* intention was to state that the light of the moon would not affect the shades, or anything of that nature. You could not see by the light of the moon; daylight was making objects visible at that time; that is my recollec-

tion. The moon was in the east; I didn't observe if it was about forty-five degrees—about middle ways between the horizen and the zenith; I observed that it was a clear night; I did not see any haze or mist or cloud. As far as my observation went, it was perfectly clear.

76 Redirect examination:

I stated that when I read the copy of the Dallas News at 7:40, I read the want ads, which is the very fine type; at the time I read it I was near the trestle and a little west of the scene of the accident on the railroad track. I hadn't a bit of difficulty in reading. I was not in any manner enabled to read by the light of the moon; it was daylight at 7:40, that enabled me to read. Objects were not visible by moonlight at that time, they were showing by daylight.

I remember there was an engine brought a caboose down and left it at the point where the accident is said to have occurred; then the engine backed down to where I and other parties were standing; the engine was headed to the east, and was west of the caboose left standing at the supposed point of the accident. I remember getting up into the cab of the engine and making some observations. We got in the engine between 7:45 and 7:50; at 7:50 the caboose was plainly visible; people could be seen walking around clear up to the cattle guard. I stood in the engine between the cab and the tender and looked through the little window on the engineer's side—looked out along the side of the boiler and I also looked out from the north side and also I occupied the engineer's side and looked both through his little window in the cab and leaned out to the side. The headlight of the engine was not lighted at that time—7:50. With the engine standing on the trestle and I standing on the engineer's side of the engine or on the engineer's seat looking out through the window in front, I could see the end of the caboose standing at the place of the accident; I could see people around there. It is a fact that the defendant's party and the plaintiff's party were there making observations and there was quite a crowd around there. I could see the men walking around on the ground around the caboose and I could see telephone poles, I could see houses up in town and could see the cattle guards and people walking around the cattle guards. At that time—7:50, the moon would have nothing to do with my ability to see objects. The moon in fact would have obscured my vision, if anything; the moon would not have been visible if we had looked for it; it was above the horizen; the moon would not make a shadow; objects were visible by daylight and not by moonlight.

I counted the rails from the trestle, the point where I made my observations, up to the caboose; there were twenty-one rails, thirty feet long—630 feet. At the time I was making these observations
77 I was 600 feet and over from the caboose, standing up in the cab of the engine; the headlight of the engine was not lighted. There were no tail lights—no lights of any kind on the caboose at that time; there were no lanterns or torches around there anywhere.

After making observations at 7:50 with the engine on the trestle, the engine was moved up to a point within 250 feet of the caboose; it was still visible during the moving of it up to the point within 250 feet of the caboose. It was visible at all times from the north side of the cab and from the engineer's side, and the close- you got the better view you had of it. It was not visible at all times from the egineer's side if you looked through the front window; by leaning outside of the window it was. At the point 250 feet from the caboose it was entirely clear by looking through the front window from the engineer's side.

After making observations at 250 feet away, the engine was backed down west to a point somewhere about the bridge and the headlight was turned on and the engine approached the caboose again with the light on; the reflection naturally turned to the right—the bulk of it being on a curve; then it turned to the left as we approached the caboose. We came to within 375 feet of the caboose and the engine was stopped; it showed very plainly at that distance; while the main focus of the headlight of the engine was to the south of the caboose, the north side of the caboose was also light; the light shone considerably to the north of it.

We first left the trestle at 7:50 without the headlight burning and went to a point within 250 feet of the caboose; we then came back down to the trestle and turned the headlight on; it was then five or six minutes past 7:50. With the engine standing on the trestles and the headlight turned on, I could see the caboose; I could see it looking through the front cab window on the engineer's side. The engine was then moved up to a point 375 feet west of the caboose and stopped. As we moved from the trestle up towards the caboose with the headlight turned on, going towards the caboose looking through the front window the caboose came within better vision as we approached it. When we got up to a point 375 feet from the caboose as we approached, there is a curve there—the main focus of the headlight showed to the right, or south of the track. When we got to the point 375 feet west of the caboose with the headlight turned on we could see the caboose plainly—it could be seen clearly; the light shone
on the end of the caboose and made it show up, looked like the
78 side of a wall; no mistake could have been made as to the
object and what it was; that was by reason of the headlight from our engine. The headlight shone on the caboose—both sides, very plainly. I could see the little grooves in the pannels of the wood—if you remember, there are little grooves in the sides of the car; you could see the knob on the door; the lookout on top of the little tower up there was entirely visible—it was perfectly plain. I could see people standing around on the ground. This was very nearly eight o'clock; objects were entirely visible by means of the headlight. We got out of the engine and walked to the caboose and it was then eight o'clock.

Cross-examination:

I was in the caboose when the headlight was turned on; it was not perfectly light when the headlight was turned on, it was not

dark—it was dusk. It was a very bright moonlight night later on. I don't remember seeing a man carrying a lantern with him when he turned on the headlight; my recollection is the headlight was turned on from the engine cab, by a button. I didn't notice a man come out of the engine cab with a lantern and go around and turn the headlight on; he may have done so, I don't remember. I saw the engine pull the caboose down there from the yards to make this observation; that was about 7:45, I think, that the caboose was pulled down there; no, it was not 7:30 or 7:35, it was 7:45. I saw a train come in there and go in on the side track and then bring a caboose down and leave it just about this west "Y"; I saw that; there was a train out there; I didn't notice the movements; the engine came in on the south track, if I remember right, and got the caboose—I don't remember where the caboose was, I remember them bringing it in there.

Mr. BOWLIN: State whether or not you saw the lights show on the rear end—red lights on the rear end of this caboose on which the test was made while standing up there?

The WITNESS: I knew there was a caboose there; I made no observation whatever until after the engine had left it; I expect it was carried down about 7:45, to the scene of the accident; I don't know any of the train crew; I don't know what train crew made this test;
79 I don't remember whether the brakeman who came down there to spot that caboose at the place of the accident carried a lantern or not; I don't remember any headlights except the headlight of the engine, it was turned on. I didn't notice Mr. Bone when he came down with the caboose; I didn't notice him carrying his lighted lantern. I didn't see him carrying his lantern right on until he got up in the cab where I was and then put it out. I didn't notice that; I didn't pay any attention to it; I didn't see a man take his lantern and go and turn on the headlight and then come back in the cab on the running board; the headlight was turned on from a snap button in the cab. I saw you (Mr. Bowlin) there; I don't know what representatives the plaintiff had there when the experiment was made. I didn't know who the plaintiff was or his representative, or anything about it.

It is not a fact that I could have seen everything I saw there before sundown, from moonlight at midnight.

Redirect examination:

I was formerly county surveyor of Tarrant County; I now do work for anybody. I have lived here something over seven years.

Capt. T. B. BOYD, a witness for the defendant, being duly sworn, testified as follows:

My name is T. B. Boyd, I live here in Fort Worth; I am engaged in the real estate business. I remember the second day of May, 1909, at your request (Mr. Thompson, counsel for defendant), going out to Thurber Junction to make some observations with reference to an accident that is said to have occurred there west of the town—what is known as the Prater case. We got to Thurber

about three or four o'clock in the afternoon. I had pointed out to me the place where the accident is said to have occurred. I remember going down west of there and making some observations; it was a clear, bright day; I know where that little trestle is west of the station there. It was a considerable hill about a half mile west of there, I should think. I made some observations as to the sunset. I compared my watch with the railroad time; the sun set according to my time about 7:18 or 7:20. I remember staying down there about the trestle until an engine came down and left a caboose at the point of the accident. I then got up in the caboose [of] the engine and made some observations. It was 7:40 when I got up in the cab to make these observations. I remember the degree of light or darkness at 7:40; it was light enough to see; I remember Brooks Baker being handed a copy of the Dallas News down there while we were on the trestle; he could read it; at the time he was reading the paper I noticed the condition of the elements with reference to being light or dark; it was light enough to read; there was a moon that night; at that time the moon did not make any light. I don't think you could [see] the moon very much, it didn't seem to make any light, it was not dark enough. I got into the cab of the engine and made some observations with reference to looking down to the place where the caboose had been stopped; we looked through the cab window on both sides—both the fireman's and the engineer's side. The headlight had not been turned on then; the engine at this time was standing near the trestle; that was 7:40; it was 7:40 when we got in the cab; I am not mistaken as to that; I made a memorandum afterwards. After we made these observations the engine was backed down the line west and then came back again—moved up a little nearer. It backed down first and then came up *and* little nearer, I would guess about 375 or 400 feet; it was then about 7:47, I think; we could see the caboose then from both sides of the engine; the headlight was not yet turned on. We could see houses up in the south part of the town yet and see telegraph poles. I saw buildings back up the track. We made our observations from each side of the cab—looking through the cab windows. After we made these second observations they turned the headlight on and ran maybe a little nearer and stopped. The headlight was turned on I would say while the engine was 375 or 400 feet down the track; when the headlight was turned on it shone on the caboose plain. Most of the light was to the south of the track, but you could see the caboose plain. We got off of the engine and walked up to the caboose and in walking up it showed plain. When we got up to the caboose I took out my watch and was standing on the north side and I could see the time; it was right at eight o'clock then. At that time we could begin to see the moon shining a little; with reference to the time I made the first observation down at the trestle up in the cab, there was a memorandum made by which I can refresh my memory as to the exact hour or minute, on any given proposition. I made a memorandum at the time ; I haven't got it with me. On the next day you (Mr.

Thompson) prepared a paper regarding the matter which I signed. That paper was correct.

81 At the time we made the observations from the engine cab, the engine was covered—it was a regular engine cab.

Cross-examination:

I say I know the light I saw was twilight or sunlight from the reflection of the sun; I know it was not moonlight; I know that just as well as I know anything; I saw the moon; I guess the moon was about two hours high or two and a half; the moon was in the east—southeast. I presume the moon was past the first quarter at that time; it was not in the east, it was in the southeast. I guess it was about half way of the meridian; perhaps it was more than half moon; it was clear and the moon was in full view—nothing to obstruct the moon. There was moonlight at eight o'clock; I don't think there was much moonlight at 7:40 or 7:47. There might have been some I can't tell you. I expect it is a physical fact that if the moon is in the condition I stated that it does give some light. It is a further fact that I saw them bring this caboose there and knew it was there; yes, I went there to be a witness for the railroad company—went there to see if I could see the caboose. We first made observations without the headlight and later the headlight was turned on and we looked at it. I guess it was about 7:55 before the headlight was turned on; 7:50 or 7:55. That headlight reflected on the end of the caboose; it is a fact that there was more light on the side of the track than on the north side—more on the south side than on the north side. We were fully 350 feet from the caboose. It is true that the further you are away from the source of this light the broader is the field that it covers; if we had been within 60 or 75 feet of it it would shine right on the caboose. When it was on that curve, the main current of the light would not shine on it; we were 350 feet from the caboose when we made that experiment. I don't think it is a fact that the engine approached within 65 or 70 feet of the caboose before the main light reflected upon the end of the caboose. I am positive of that; I am as positive of that as I am of anything. I didn't see lanterns there being carried by railroad men there in the yards before this experiment was made. I didn't see any lantern; I didn't see any lantern there at all at that time; if there had been lanterns there I think I would have seen them; I tried to see everything. That is what I was there for. About the time we went out, there was a man came around the caboose

82 with a lantern; we were going up to the caboose after we got out of the engine, and there was a man came around like he was coming down from town, he had a lighted lantern. I didn't see a brakeman come up there where this engine was with a lantern in his hand, and after he got to the engine put it out.

Redirect examination:

When we got off the engine the last time and walked up to the caboose I looked at my watch just after we got there; I stepped on the north side of the caboose to see if I could see what time it was,

and it was two minutes after eight. We must have gotten off the engine just about eight o'clock.

When the engine was back on the trestle and the headlight turned on, the headlight shone on the end of the caboose; we could see it plain while the main light was to the south.

Recross-examination:

We were fully 350 feet from the caboose when the headlight shone upon it. I guess the moon was shining then a little, because it was about eight o'clock. I saw Mr. Brooks Baker read a newspaper at 7:40; I know he read out something like he was reading; I didn't look to see whether he was reading it correctly or not; he said something like he was reading; of course, I don't know whether he was reading or not—don't know whether he had memorized something for the occasion or not. He was a witness, too, for this very purpose.

Redirect examination:

When he was handed the paper to read I can state from my own observation that it was light enough to read without the aid of the moonshine.

O. W. HEAD, a witness for the defendant, being duly sworn, testified as follows:

My name is O. W. Head; I live in Fort Worth. On the second day of May 1909, at your (Mr. Thompson's) request, I went out to Thurber Junction to make some examination and observations at what was pointed out to me as the place of the accident to Mr.
83 Prater. I made some observations as to the sun setting on that date. We were down beyond the trestle when we noticed the sun begin to go down. I remember having seen the yard limit board; we were down beyond the trestle in the vicinity of the yard limit board. There are some hills west of there; the sun went out of our view there behind the hills or mountains, about 7:20, I think it was, somewhere along there. I remember an engine coming down and stopping a caboose at the point where the accident is said to have occurred and then come down close to where we were on the trestle. I remember about Brooks Baker, a man in the party, being handed a paper to read; that was about 7:40 or 7:45, somewhere along there. At that time you could see—I could see away beyond where the caboose was and could see persons above it and around it, and the timber and trees beyond it. I was not aided any way by the moon; I didn't notice the moon until after we stepped off the engine. My attention was called to it; I didn't notice any light from it until after we stepped off of the engine. I got on the engine when it came down there and made some observations; at the time I got on it we were west of the trestle and some distance, I don't know just how far. I must have got on the engine at about 7:38, or 7:40. I looked out the windows of the cab of the engine on each side, and I could see the caboose plainly standing up there and could see persons on the track and my attention was called to the telephone posts and I could see them. The headlight was not burning at that time;

after making this observation the engine was moved—it was moved both ways; it was first moved towards the caboose and then back again; I don't know just the distance the engine stopped from the caboose—some distance, though west of it. From there we could see the caboose and could see persons standing around it; I looked from the windows on both sides of the cab; the headlight was still not lighted; the caboose could be seen plainly. It was daylight; I didn't notice the moon until after we stepped off; it was about eight o'clock then; I didn't notice any reflection of the moon; the electric headlight of the engine was then turned on; I don't know the exact position of the engine at the time the headlight was turned on—the headlight of the engine we were on. I don't recall the distance we were from the caboose when the headlight was turned on; I should guess two hundred and fifty yards; I didn't make any measurements. The headlight of the engine shone on the
84 caboose stronger on the south side than on the north, but you could see it from either one of the cab windows. We made observations from two points with the headlight on; the engine was moved up. We could see plainer from that side of the track (indicating) after we got on that curve. The last time we got off the engine was about eight o'clock. I had been making these observations from the time I got on the engine until I got off.

Cross-examination:

I went out to Thurber at that time at the request of the railroad company for the purpose of making these observations, I suppose, for the purpose of being a witness in this case. I didn't see any lantern until we stepped off the engine. I know the first I saw a man with a lantern was after we stepped off the engine; if the moon had been shining I could have seen it. Yes, I got nearer than 350 feet of the caboose in making these observations; I don't know the exact distance, I didn't make any measurement; at the time the headlight was turned on it was dark enough then to make the headlight go right in front of it. The best of my recollection is the headlight was turned on about 7:40 or 7:50, somewhere along there. It was a clear reflection, right from the headlight—a good reflection. The light was stronger on one side of the caboose than the other when the light was turned on, because there was a bend in the road. I didn't see a brakeman come up to where I was at the engine before the headlight was turned on with a lantern. I knew where the caboose was I had seen it before I got on the engine; when I got up on the engine I knew where the caboose was; I went there to see it—that is what I was there for.

Redirect examination:

I have no memorandum as to the exact time the headlight was turned on; I think between 7:40 and 7:50 the light was turned on; probably 7:50, a short time after that we got off the engine; we got off at 8 o'clock, because we noticed our watches—two of us; the electric headlight was turned on a short time before that; it was 7:40

when we go on there; I noticed that somebody said it was 7:40 or 7:42; something of that kind.

I have described the movements of the crew with the engine from the time I got on the engine until I got off the best I could, it has been so long ago.

85 —— VERNEY, a witness for the defendant, being duly sworn, testified as follows:

My name is —— Verney; my occupation is that of an engineer; have been such for five or six years.

I remember, on the second day of May, 1908, an accident at Thurber Junction in which Mr. Prater was pulling an engine and caboose and ran into a standing caboose. I was the engineer of the train, the caboose of which was run into by Mr. Prater; he followed my train in; I had come from Baird. Thurber Junction was the end of my run. After reaching Thurber Junction I stopped my train at the point where it was struck—in the neighborhood of a car length of it; that would be about 60 feet west of the cattle guard—west of the switch—that is where I stopped my engine. I am under the impression I had fourteen cars in my train; whether that includes or excludes the caboose, I don't know. The caboose was on the rear end; the reason for my stopping at this point near the cattle guard was there was a train ahead of us going in the same direction; we were going in on the main line, and there was a train headed in the opposite direction on what is known as the passing track. After we got in there to the proper place the cars I was pulling would be stopped to unload merchandise from the platform of the depot; it would not be left standing on the main line. The engine, after we completed our work, would be placed on the track on which engines out of service are placed and left there over night, until called for the next day's work. That was the regular run between Baird and Thurber Junction for these trains. My train reached Thurber and stopped at that point at 7:32 or 7:33, I can't remember such details as that. After the train stopped it was not moved until it was struck. When I reached Thurber I stopped and the first thing I did was to look around my engine to see if there was any defects in sight to repair there at Thurber Junction. I found the connection with the main pin was a little warmer than I thought it need to be, and I screwed the grease cup down and that was all the work I did on the engine. I then got a magazine out of my seat box and read for a while; I sat down on the ties on the south side of the track next to the tank. When the accident occurred I had just gotten on the engine a moment previous and was on the right-hand side; I don't know how long it was before the train was run into that I was reading this magazine, but it was a very short while; as near as I can ap-

86 proximate it it was two or three or four minutes; the first thing that attracted my attention to the fact that there was a collision was the shock to my own engine.

My engine and train was not moved immediately prior to the collision; we didn't move after we stopped until after the accident. The caboose attached to my train could not possibly have been

moved backward without my engine moving. I had just given up reading at the time of the collision, because it was no longer convenient to read with the light I had; that is about as near as I can state the degree of light or darkness at that time. It was not too dark to see a considerable distance; I remember the station house was quite visible about the time of the accident: I don't know just how far that was away; probably thirty car lengths; it was still east of where I was; I didn't see or hear Mr. Prater's train before it struck the caboose; it was not possible for me to see it from where I was, nor possible to hear it there, I think I didn't see it or hear it. The collision occurred right close to 7:45; I remember taking out my watch immediately after the collision and it was then 7:46 by my time. We are required to keep nearly accurate time; I went down to the scene of the accident—I don't know just how soon; it was getting pretty dark by the time I went down there; I don't know just how long it was after I felt the shock of the engine; I can't even approximate it; I didn't do anything after I felt the shock to the engine that I know of; of course, there was nothing to do; of course, I found out what was the cause of the collision. It did not require any close investigation to learn what the cause of the trouble was.

When I got down there Mr. Prater was lying on the ground on the north side of the embankment with a crowd of men around him, close to the caboose. I can't state exactly what the state of the darkness in walking down there to where Mr. Prater was; I remember I could see Mr. Prater, but not very distinctly, laying on the ground. O, yes, I could see a box car at that time. I don't know just how far I could see a box car at that time with the natural eye; I could see an engine; I saw the engine there at the caboose when I got off of my engine. My engine didn't have the headlight burning at that time.

Cross-examination:

No, the headlight was not burning on Mr. Prater's engine when I got there; I am not sure of that, but I don't think it was;
87 that is the best of my recollection. I don't know whether my train had any tail lights out or not; I did not see any; I could not see the rear end from my seat; I am not certain as to the exact time I began reading the magazine, except I am certain as to the time I stopped and the time I looked at my watch after the accident occurred.

When I looked at my watch it was 7:46. Yes, it is true that the headlight on Youngblood's train—the train on the side track, was lighted. I have no recollection of seeing a brakeman walk by my train with a lighted lantern. The tail lights were burning on the train just ahead of me.

When I got back to where Mr. Prater was it was quite dusk; it was not as dark as it got later on; I distinguished Mr. Prater on the ground; if he had been a stranger I probably would not have known him; very likely my knowing who was in charge of the engine entered into my recognition. I didn't start back there immediately after I felt the shock; I don't recall what I did not; I do not, as a rule, when anything of that kind occurs start immediately to it.

Q. Whose duty was it to put out the lights on your train?

Mr. THOMPSON: I object; that implies that it was a duty to put them out.

The COURT: I will permit the question.

Mr. THOMPSON: We except.

The WITNESS: It was the duty of the rear brakeman to put out the lights, as I understand it.

Q. Whose duty is it to see that it was done?

A. I understood that that is the conductor's duty.

I am still in the employ of the Texas and Pacific Railway Company. I have been running an engine between five and six years. As to going into a station with your engine under control, speed is only one of the conditions which are necessary to take into consideration. I would consider that six or eight miles an hour, or ten miles an hour as being under control at that place.

No, it is not a fact that I read my magazine first and then got down and fastened that tap afterwards. My fireman's name was
88 Matthews; he was on the left-hand side of the cab at the time of the accident; I saw him here in the witness room a few minutes ago. Mr. Matthews, my fireman, didn't say to me, "here comes a headlight," and jump off the engine. I was not excited very much at the time; not as much as you would think; I confess to very little excitement on that occasion. I know Mr. Mann; I don't remember whether he got to where Mr. Prater was before I did or not. When I was going down to where Mr. Prater was I did not meet a man with a lantern going for the doctor. I am not sure I did not meet anyone, but I have no recollection of it.

Redirect examination:

It was a perfectly clear evening. There was a yard limit board down west of the trestle; there was a rule in force at that time what on reaching that yard limit we must have our engines or train under control; I understand by being "under control," to be able to stop in time to avoid striking any obstacle—that is to say, to stop on the track that was in sight.

JOHN RESCHE, a witness for the defendant, being duly sworn, testified as follows:

My name is John Resche; I am in the employ of the Texas and Pacific Railway Company as a civil engineer. I know the track west of Thurber Junction; I made a plat of these premises; this (indicating) is one of them. I know where the accident is supposed to have occurred to Mr. Prater's engine.

(Here witness takes blue print prepared by him and explains same to the jury.)

This is the main line (indicating). This is the hotel that the Chinaman runs; this is the depot; this is the side track south of the depot; this is the "Y" where they go out down to Thurber, down to the coal mines, four or five miles. The point where the collision occurred is right here (indicating). This is the trestle; this is the

yard limit board; I made some measurements there; from the yard limit board to the point of the accident is 1385 feet; from the point of the accident up to the headblock it is 840 feet, and from there to the cattle guard is about twenty-five or thirty feet; that would make it about 810 feet from the point of the accident to the cattle
89 guard. This (indicating) represents the east end of the curve; this curve starts 254 feet *was* of the west headblock and runs in an easterly direction, bearing to the north. It is a two-degree curve; the curve starts 157 feet east of the trestle; coming from the yard limit board down to the trestle it is straight track, up to this point here (indicating); then you start on the curve bearing towards the north; the end of the curve is 254 feet west of the west headblock of the Thurber Junction yards. The curve extends from the point marked "X" to the point marked "Y;" this is a two-degree curve; a two-degree curve is a curve whose radius is 2865 feet; that is, if you draw a circle, it would be 2865 feet from the center of the curve to the outer edge of the curve.

This is not a sharp curve; it is a light curve. (Witness is shown profile of the track at this point.) This is a profile of the line; this broken line represents the contour of the ground; this heavy line represents the grade line; the grade from the trestle to the point of the accident is level; the right-of-way is about 150 feet—75 feet on each side. The timber there is scrubby timber—mesquite and oak. A person standing on the trestle or in that vicinity, if it is not dark, can see the town.

I never paid enough attention to a headlight of an engine to know just how far they shine down the track in front of an engine; they shine a considerable distance, I know that.

Cross-examination:

(Witness is shown photographs.) This photograph represents the timber there; that is not the kind of timber that grows in this part of the country; there is a variety of timber—mesquite and oak, and I guess some elm.

To start in at the curve—where the curve begins at the west and draw a straight line to the east end of the curve, the straight line would be something over 100 feet north of the track at the center. This drawing is on a scale of 100 feet to the inch. The proper regree of curvature is not shown, it is not drawn to scale at all. This line I have drawn on the blue print represents the curve there exactly.

90 JOHN W. WARD, a witness for the defendant, being duly sworn, testified as follows:

My name is John W. Ward; I live at Big Springs, Texas; I am division superintendent of the Texas and Pacific Railway Company; I have occupied that position for twelve years and a half. I know where Thurber Junction is. I know Mr. Prater, the plaintiff in this case. I know the place where the accident occurred; I know where the yard limit board is. My division extends from Fort Worth to El Paso. I claim to be familiar with the rules of the company with

reference to the operation of engines and trains over that division. As superintendent I have charge of the movement of trains over that division. I had that yard limit board installed there west of Thurber Junction for the purpose of preventing trains occupying the main line track from having to send a flagman back to protect the rear of their trains. Engineers coming into Thurber Junction when they reach the yard board, they are supposed to have their trains under full control so that they can stop within the range of their vision if there is any obstruction on the track ahead of them. They are also required to reduce the speed of their trains and keep a constant lookout ahead for anything that might obstruct the main line track.

(Witness is shown blue print.)

This is the yard; these are the "Y's" (indicating); the east and west "Y's" at Thurber Junction. They are used to a large extent for the purpose of turning engines and trains and taking what we call the siding to let other trains by; trains are headed in on the west "Y," and when they are ready to proceed on their trip, they are backed out and come onto the main track and proceed. The rule regarding the yard board at Thurber Junction is not carried into the time card rules. That rule has been in existence there for five or six years. So far as my knowledge extends, this rule has been acted upon by all those operating engines. (Witness is shown paper.) This is the rule that was originally issued to cover Thurber Junction at the time the yard limit board was installed—this is a copy of it.

Mr. THOMPSON: I will offer this rule in evidence, dated April 1, 1903, which reads as follows:

91 Copy.

"The Texas & Pacific Railway Co.

Office of Supt. R. G. Div.

BIG SPRINGS, TEXAS, *April 1st*, 1903.

Bulletin.

All Conductors and Engineers:

This is to advise you that a yard limit board has been erected about fifteen hundred feet west of bridge 97, about one-half mile west of Thurber Junction.

All trains will approach this limit with trains under full control expecting to find other trains or engines occupying the main line, but all freight trains will not be expected to occupy this limit on the time of passenger trains without flagman being out the required distance.

Yours truly,
(Signed) J. W. WARD.

C. C. to Baird, Thurber Junction, Ft. Worth."

That bulletin was issued; that has application to freight trains intended to be stopped and occupying space on the time of a passenger train; that insures passenger trains getting through the yard limits without being stopped and without having the protection as prescribed by other time card rules. If a train stopped within the yard limits between the yard limit board and the station, and a passenger train was due, in order that the train—freight train could not occupy this space without sending a flagman back; it was not required under the rules with reference to approaching freight trains.

I have read rule 13; that rule applies to any place where a train might be stopped between stations, or at stations where there might not be a yard limit board. This rule has application where there is no yard limit board. I have been around the station at Thurber when trains were standing in the yard there quite frequently, and observed the way they were handled. I have never seen a flagman sent back to protect freight trains within the yard limits; I have for passenger trains.

According to the rules and practice, tail lights should be put on the caboose at or before dark. I would say it was the practice quite frequently that where a train was standing at a station and they were to go beyond and not quite dark at that time, but would
92 become dark before they reach the next station, that they put tail lights out while waiting at the station.

J. W. BARGER, a witness for the defendant, being duly sworn, testified as follows:

My name is J. W. Barger; I live in New Mexico, 181 miles from El Paso. I work for the El Paso Southwestern Railroad Company. On May second, 1908, I was brakeman on Mr. Nichols' train at the time of the accident at Thurber Junction. I was rear brakeman. I remember coming into Thurber Junction on that occasion. When the train got into Thurber Junction Mr. Nichols was in the caboose—Mr. Nichols was the conductor; he went over to the depot as soon as he got his lamp. I didn't have any lights on the rear end of the caboose; it was light enough that we didn't have to have lights; we didn't know whether we were going to get in right away. The first I knew that Mr. Prater's engine and caboose was approaching was when I heard it, and then I looked and saw it; it was away back about the curve; I was in the caboose lighting my lamp; I just had got it out of the box and was lighting it when I heard something and looked out the back end—rear end of the car—the door was open; I looked out and heard him coming and I looked and he didn't have any train, just an engine and caboose, and I picked up my lamp and stood there, and he still kept coming, and I saw he was coming pretty fast, and I says, "he is going to make a passenger stop," and I walked out on the rear platform and he was still coming and didn't seem to shut off, or anything else, and I says then, "he can't stop if he wanted to, and I commenced to flag this way (indicating) on the rear end of the caboose, and I saw he was not going to stop and I got off and started for him and when he hit I was a car length in the rear of his caboose. I went

down on his side—that would be my left—his right; that would be the south side; I was beside the track; I was trying to flag him with my lantern, running and swinging it as I went. When his engine came in contact with the caboose and stopped, I was behind his caboose about a car length, any way. I ran back on the same side up to the engine, and I didn't see anybody and about that time the conductor and brakeman came out of the forward end of the caboose and wanted to know if anybody was hurt; then I went around the caboose—I walked around the caboose—came back west
93 of and around the caboose and up the other side. I discovered Mr. Prater; he was down in the Johnson grass; I didn't see the fireman until after we found him. The fireman came up the track from the west. The fireman got off further back *and* than where I was when the train passed me; he must have got off two blocks back; I walked from where I was on the south side of the track up to the engine; I looked up there and saw no one; I walked back to the rear end of the caboose and just at that time the conductor and brakeman came out the front end of the caboose—that is, the front end of Mr. Prater's caboose; then I walked back to the rear end of the caboose and went around and went to where Mr. Prater was. I first noticed the fireman after we had got down there talking to Mr. Prater; he came up from the west when I first saw him, he was coming up the middle of the track. When I first saw the train coming it was probably a good deal over a block away; when I went back to flag him and when he passed me he was probably going at the rate of eighteen miles an hour. I had flags on the rear end of the caboose. When we got to Thurber Junction my intention was [to put] out the red lights as soon as I got to them. I had to light the hand lamps first and then the other ones.

Cross-examination:

The first thing I did when I got there was to light Mr. Nichols' lamp and give it to him. When I first say this train coming it must have been a block away. I mean by that a city block. I then took my lantern and walked out on the platform; I swung it and he didn't observe it, and then I started for him; I started towards him and then got out of the way. When he hit I was about three car lengths from the caboose; I was about three car lengths from the caboose when he hit it; the train was running about eighteen miles an hour when [*when*] it passed me. No, sir, this all didn't occur while the train was running two hundred feet. All this occurred after the the train showed up around the curve. When I went to Mr. Prater, there was the conductor and brakeman and myself there; he was was on the ground; I didn't know Conductor Smart; I didn't know who the conductor was; I don't know Stone. This conductor and brakeman were all that I saw there at first. I didn't see the fireman get off; he was down below where I was. I didn't state to Mr. Stone or the conductor nor anyone else there that the reason I didn't have my lights out was that I was trying to get them out and
94 they ran the train back and I couldn't get them out. Running the train back would have nothing to do with my put-

ting the lights out. I didn't say they ran the train back and didn't give me time to put the lights out. Our train never moved from the time we stopped until it was struck. I don't know just how long we had been there when the collision occurred. It was not fifteen minutes; I gave Mr. Nichols his lamp and he started for the head end, and I don't think he was over two-thirds of the way up the train when it struck. It was probably eight or ten minutes. It is not a fact that I was in the caboose and heard the train coming—looked and saw it coming and ran for my life and jumped off. The first I knew the train was coming was not the flash of the headlight; I don't believe the headlight was lighted; I know it was not, because I was standing right in front of it. It was not dark. I lighted Nichols' lantern simply because I didn't know what time we were going to get in; he thought we would get in right away. We could see up in the yards.

Redirect examination:

I didn't notice the headlight; it was coming right straight for us; there was nothing lighted; nobody had lights lit, as far as that goes; Gee Whiz! it was daylight; I stepped out on the platform and gave him a stop signal; I didn't jump off, I stepped off; I stepped off on the left-hand side facing him and went down on that side of the track. It must have been probably a half block from me when I started for him. I went about three car lengths, or three and a half, from the caboose. I can't state how far he was from me when I left the caboose; I didn't take any notice. You see, it is on a curve; I heard him coming; you can't see back in here (indicating); when he first showed up I stood and watched him from inside the caboose, I didn't think much of it, and I stood there waiting, and he never whistled or anything; if the door hadn't been open I would have been in there, too. When I picked up my lantern I had just cleaned and lighted it, and I went on out and I commenced to give it to him, and he never answered or anything, still kept coming right along, and then I started for him.

Recross-examination:

I didn't see anybody in the cab of the engine as he passed
95 me. I didn't make any outcry; I was standing right in the clear, just out to one side, and I stood there until he hit; I never made any outcry or made any alarm. I was signaling him all the time; no, I didn't "holler."

FRANK LEFLER, a witness for the defendant, being duly sworn, testified as follows:

My name is Frank Lefler; I live in Fort Worth. I am a photographer; have been a photographer in Fort Worth for seventeen years. I remember going to Thurber and taking some photographs at the scene of the accident, where a man named Prater is said to have been hurt; I had pointed out to me the place where the acci-

dent is said to have occurred, and the surroundings—everything was pointed out to me; I took views of the whole surroundings there. This photograph marked No. 6 is a view taken a certain distance from the yard at Thurber; it was about 150 or 200 feet from the cattle guard, where the road crosses there at the cattle guard, showing the Thurber yards; my data is on the back of the picture that I made at the time I took the pictures. My data shows this was taken 400 feet from the west switch; the west switch ends right east of the cattle guard; you can see it very plainly there.

Photograph number 7; my data shows that to be a view 2975 feet west of the accident; that is the distance, showing the road from that point to the point of the accident; and there was a caboose left standing right at the point of the accident; you can see that caboose from there; that caboose is supposed to be at the place of the accident.

View marked number 3 was taken inside of the engine cab; I placed my camera on top of board, or water keg, making the lens just about the height of the engineer's head looking out the front window of the cab, this shows the side window; this is the front window. The measurement from there—we measured it afterwards, is 1350 feet west of the point of accident, at the yard limit board. This does not show the yard limit board. There is another one probably 100 to 150 feet back of there—yes, this is the one, it is marked number 4; it shows the yard limit board; this is 1500 feet west of the point of the accident, and shows the yard limit board; this shows the caboose right in there somewhere (indicating). You can see it very well with a magnifying glass.

View number 5, my data tells me, was taken 3115 feet west
96 of the point of the accident. The road was almost straight from there, and then comes the curve. We were just slightly on the curve, showing the caboose standing right in there; you can see it right there (indicating). The road gives a little curve before you enter the yards. This (indicating) represents the front window of the cab of the engine looking right straight forward, along the side of the boiler; the camera was sitting as near as we could possibly get it to where the engineer sits and placed it about as high as the engineer's head, looking right out the front window as the engineer does in running his train.

View No. 2 is 300 feet west of the point of the accident. This view was taken through the front window of the cab on the south side, looking east, right where the engineer would sit. This view was taken with the camera 300 feet west of the point of the accident; it shows the caboose standing at the point of the accident. This is the first one we made; this was taken through the front window the same as the other one.

This is a picture of an engine; suppose this was looking east, this would be the south side of the engine; the front window would be here (indicating). The boiler is up this way. I sat my camera right by this window (indicating) in the cab; the boiler is up this way; the camera was raised to about the height of a man's head

sitting on the seat and looking right straight ahead along by the side of the boiler. These photographs, of course, were taken in the daytime. You can get a better view of the surroundings and more distinct with the naked eye than with a camera. You have the whole width of the window to look through with the eye, where you only have a part of the window with the camera. You can lean over this way—(indicating) and see.

Defendant offered in evidence the photographs identified by Witness Lefler, numbered one to seven, both inclusive.

J. Y. BURKE, a witness for the defendant, being duly sworn, testified as follows:

My name is J. Y. Burke; I am roadmaster for the Texas and Pacific Railway Company, and have been in that position for the last 18 years; my territory is from Fort Worth to Baird, 141 miles; it is about 81 miles from Fort Worth to Thurber. I know where the Thurber yards are; I know where the accident occurred—
97 where the engine ran into the standing caboose. I was at the place with Mr. Lefler at the time he was there and made these pictures. I pointed out the place of the accident to Mr. Lefler.

I made a test at that point with an engine and caboose, so [as to] see how soon an engine could be stopped. We made the test right at the point where the collision occurred; that is the place where we set for the stopping of the engine; we started at different points west of the point of the standing caboose. We made four stop tests; the first two tests were made at about the same rate of speed, which was a little above eight miles an hour—eight and a half miles an hour, and on each one of these tests we stopped in 53 feet. We made another test at 18.7 miles per hour—that is, the engine was running at that rate of speed and stopped in 283 feet at 18.7 — an hour. Then we made another test at 11.9 miles per hour and the stop was made in 72 feet; these tests were all made with an engine and caboose the modus operandi of making the tests was we counted the revolutions per minute to determine what rate of speed the engine was going, then when we reached a certain point from the accident, we made a stop signal and the engineer set the air and made the stop; then we measured the distance. I would say, taking that track there, that that would be a good stop for an engine pulling a caboose. I think that would be a reasonably good stop, an average stop.

The electric headlight on an engine on a straight track ought to show very small objects 2000 feet. These electric lights are strong lights. I think you could see a rabbit crossing the track, or on the track, I would say 1800 or 2000 feet. The reflected rays of the electric light would go out at something like 25 degrees. In 600 feet I think it would widen out to a space of about 150 to 200 feet.

I am around Thurber Junction a great deal in my business; that is a good, heavy exchange point. I know where the yard limit board is there. It is not the custom and practice when freight trains come in there from the west and have occasion to stop in the west yards, to send a flagman back to flag approaching trains. In fact, the yard board was put there for that purpose—to avoid that very thing.

Cross-examination:

I am not certain, but I think I made the tests with the same engine that plaintiff was operating when he ran into the caboose; I made the tests with engine 381, and I think that is the same
98 engine. It is not true that I put steel brake shoes on that engine for the purpose of making the tests, just before the tests were made. Yes; I was making the tests for the purpose of making evidence in this case. I didn't make the tests at night; it was something in the afternoon, in broad daylight. The reason I didn't make it at the same time the accident occurred is that it was not convenient—not as convenient as it was at the time it was made. I don't think the train crew that helped make the tests knew what the tests were being made for; they had no means of knowing; I didn't tell them anything; I told the engineer to take a signal, and when I gave it to him to stop; I have [gave] him the signal 100 feet from the place of the accident; their natural sense would teach them that we were making some kind of test; I don't know whether they knew what we were making them for or not. Yes, we could have waited until 7:50 in the evening to make the tests. I went out on the noon passenger train and asked them to have an engine and caboose there to make the test.

B. H. STEWART, a witness for the defendant, being duly sworn, testified as follows:

My name is B. H. Stewart. I live at Putnam, at present. In May, 1908, at the time of the accident to Mr. Prater, I lived at Thurber Junction. I was section foreman for the Texas and Pacific Railway Company; I am still section foreman for that company.

I had my attention called to the fact that an engine ran into a caboose there on that occasion. When my attention was called to it I was at the depot; I then went to the place of the accident. I didn't see Mr. Prater when I got there; I found that the engine was driven into the caboose and looked around the accident a little; I then came back to town. I stai-d there at the accident probably five or ten minutes; I didn't assist in clearing the wreck there at that time. There was nothing wrong with the track. The caboose was smashed up in such a way that it had to be got off the track. At the time I went down there from the depot it was between sundown and dark; it would not have been considered dark; at least I would not consider it dark; I carried no light with me. When I left the depot I saw the train—saw that something was wrong. I could tell that there was an engine behind the caboose—could tell something was out of order down there; just as to how dark or how light it
99 was it would be hard to tell. It was light enough to tell there was something wrong down there, and I went on down to the place. I don't know just how far I could see an object the size of a box car without the aid of artificial light; as I gas going down there—of course, the only reason I have to take notice of such a thing is that—I suppose it is 700 or 800 feet or maybe a thousand feet down there, and I could see that there was something wrong.

Cross-examination:

The headlight was not burning on the engine that ran into the caboose at the time I saw it; that was up in the caboose; it was not burning when I got there. I don't know whether it was burning before I got there or not. I didn't see it. You could not have seen the front end of the engine. There was a train on the main line; I don't know whether it had headlights and tail lights on it or not; my attention was only called to the one in trouble; I didn't pay any attention as to whether any other trains around there were lighted or not. I can't say whether I saw them or not, because I didn't take any notice; I didn't see any brakemen around there with lights at that time, I did afterwards. I never noticed any brakemen with lights before I got down there. I went down there by myself and came back by myself; I didn't see anyone at the place of the accident when I got there. Judging from all the cabooses that I have seen on the Texas and Pacific Railway, I would say that this caboose was painted red; I don't know whether a bright red or a dull red; I have no rememberance as to the color; it is owing to how long it had been painted as to whether they are a bright red or a dull red; there is some difference in the color; if a car is painted a bright red, it will fade; I took no notice of the color and I can't say whether it was a dark or light red.

Redirect examination:

The first time I went down there I stopped at the engine and caboose; they were together; I went around to the rear end of the caboose and on the other side to be sure the track was safe; that was my business to see that the track was safe—see after the track and see if it needed repair, and if it did to repair it.

100. J. F. MANN, a witness for the defendant, being duly sworn, testified as follows:

My name is J. F. Mann; I live at Mingus, known as the old place of Thurber Junction. I am foreman for the Texas and Pacific Railway Company at that place.

In May, 1908, the time of the collision of Mr. Prater's engine with the caboose standing in the yards at Thurber Junction, I was at home; I was foreman of the mechanical department. We have car shops there and about forty-five or sixty men employed there; when I received information of the collision I was at my home, there in Thurber Junction; I lived right about south of the place of the accident, about 2000 feet. I received information of the accident by phone, and went right to the place. When I got there I found the engine was driven into the back end of the caboose and the caboose partly up on the engine. The headlight of the engine was broken up; when the engine struck the caboose it drove the trucks right through under the end of the car, broke the sills of the car—the longitudinal sills, broke them up into splinters half way up the caboose and the sides of the caboose stuck back on the sides of the engine. The pilot set about half way under the caboose and the

sides of the caboose stuck up one on each side of the engine. These timbers in the caboose were good, strong timbers; these long sills and the end sills were comparatively new; they had been there not over two or three months. The caboose was driven into the car ahead of it, and broke the end out of that and knocked the trucks off—the tracks of this first one went up—the front trucks of the caboose they ran up and hit the end of the car and partly knocked it to one side. The engine had a caboose attached to it. I have had a great deal of experience and observation in handling cars and seeing them coupled together. I have been right in that business since the first day of May, 1881. Assuming that the caboose and train to which it was attached was standing and the engine and other caboose were approaching it from the west and struck it, it is my judgment from the condition I saw them in that the engine, when it struck the standing caboose, could not possibly have been running at a less rate of speed than 20 miles an hour; I think at least twenty-five miles an hour, and done the damage it did.

When I got over there from home, it was about twilight—something after sundown; I approached the scene of the accident from the south; walking in a northerly direction, coming over
101 there from home and looking ahead of me without the aid of any artificial light I could see an object as large as a caboose or a standing box car pretty nearly as far as I could see it at any time. It was a little after sundown. It was just about as near between sundown and dark as it could be; it was not night and it was not broad twilight. You could see a string of cars or a man walking a way off; I would say I could see a man walking fifteen hundred feet. I don't remember about the character of night as to whether it was clear or cloudy. I know we didn't have any rain or dampness, because we had a whole lot of goods piled up out there all night; they staid on the ground all night without any covering over them, and I know it must have been dry and clear, or I certainly would have had them covered up or made some arrangement to keep them in the dry. As I walked to the place of the accident from home I didn't have any lamp burning; I think I worked some after I got there before I lit my lamps. I think we got a chain out of the caboose cellar and got it coupled onto the engine and backed it out from the caboose.

Cross-examination:

I say now I think the engine must have been running not less than 20 miles an hour when it struck the standing caboose. Yes, I testified in this case before. I don't remember whether I stated on the other trial that it was running fifteen miles an hour or not; I don't remember just exactly what I said; I told it just like I am telling it now, about as near right as I can; I don't think I stated it was — judgment the engine was running fifteen miles an hour on the former trial of this case; I might have, I don't remember, that was nearly a year ago—I think about a year ago. I should not think my opinion would be better then than now. Yes, there is quite a difference in fifteen and twenty miles an hour—it is one-

fourth more. I didn't notice any other train lighted up around there as I went from home to the place of the accident. I didn't see any train right in front of this one that was lighted up; I didn't see any brakemen or railroad men around there with their lighted lanterns in their hands as I went down there. I didn't see any lights until I got there; I then didn't see any lights until I had them lighted; about fifteen minutes after I went there I saw a man have a torch and tools to work with.

I don't know a brakeman named Barger; I didn't see a man there with a lantern when I got there; if there was a lantern
102 there I didn't notice it, I had no use for it; I didn't pay any attention to the light or darkness; it was not bothering me at the time I got there. I was looking after the train to see what was to be done to get the wreck cleared away as soon as I could. I generally look out for everything when I go to a wreck; I keep my eyes "skinned" looking out for everything, that is my business. I didn't see any brakemen with lights then, yet I was looking out for everything.

Redirect examination:

As I approached the place of the accident my eyes were on that.

Mr. —— ANDREWS, a witness for the defendant, being duly sworn, testified as follows:

My name is —— Andrews; I live at Fort Worth; I am a brakeman; I was brakeman at the time of this accident; I was braking on a freight train headed east, at Thurber, at the time of the accident. When my attention was called to the fact that there was an accident, I was at the road crossing there right even with the depot; about ten minutes after that our train left going east. I noticed the degree of light and darkness at that time; it was just between sun-down and dark, but it was not dark; when I coupled up this crossing about the time I was told about the wreck, you could see the length of the side track all right. On a straight track just with the natural eye I know I could see thirty car lengths; where I was I could see thirty car lengths. A car is thirty-six to forty feet long. After our train pulled out of Thurber I had occasion to observe some objects. I coupled up the crossing; we had about 25 cars in the train, and I got on about middleways of the train and I rode up about twenty-five or thirty cars beyond the coal chute at Thurber, and I walked over—just walked back to the caboose and Engineer Robinson was in the caboose deadheading, and we got to talking about it; as a result of that conversation I made some observations. I looked back towards the coal chute; I observed the coal chute; we were then thirty or forty car lengths from it; I could see the coal chute without any trouble; I was on a moving train and it was stationary. My observation—looking at the chute—was made in view of having heard of the collision.

103 Cross-examination:

This coal chute is up about twenty feet high; I don't know whether it is thirty feet high or not; I had the skylight, yes; no, it was not between me and the skylight like that building over yonder (indicating); I didn't have such light as that; I might have been able to see it in the night time if it had been a real moonlight night. I was the rear brakeman, it was my duty to put out the tail lights on my train; we had been in the yards there thirty or forty minutes before we pulled out; I put my lights out before Youngblood cleared the east "Y" for the engine to come in there. Yes, I was carrying my lighted lantern; I don't know whether I was carrying my lighted lantern at the time of the wreck or not; my train was coming to Fort Worth.

The next station east of Thurber Junction was Gordon; that is five miles from Thurber Junction.

It is agreed that the cross examination of the witness, Smith, was substantially the same as that given on this trial.

Defendant closed.

R. N. BONE, a witness for the plaintiff, being duly sworn, testified as follows:

My name is R. N. Bone; I live at Fort Worth, Texas. My occupation is that of a railroad brakeman. On the third day of last May I was brakeman on the Texas and Pacific Railroad. I remember a test being made at Thurber Junction on the second day of May, when Mr. Thompson and others were present, and also Mr. Bowlin. I was brakeman on the train that they made the tests with. I don't remember just what time we got to Thurber that evening with the train.

(Witness is shown photograph.)

I recognize this as a photograph of the switch that comes down here west of the cattle guard. I spotted that caboose as well as I remember about 100 *years*. I judge from the west switch of the west leg of the "Y." Before the caboose was moved down
104 there we moved the caboose just about clear of the west leg of the "Y"—I mean just east of it; it was in the evening, I don't remember just exactly the time; I don't remember having occasion to come uptown before it was carried down to that place—before it was carried on down to the place where the test was made. I don't remember coming up there until the engine was brought around the "Y" to take it through the passing track; I don't remember what time that was. I remember seeing you (Mr. Bowlin) there, but I don't remember how long before the caboose was taken down there. I remember coming along and seeing you (Mr. Bowlin) and some other people standing there. That was just about—as well as I remember, about twenty minutes before the caboose was moved down on the curve where the test was made. Twenty or thirty minutes, something like that; I don't remember seeing any-

thing on the rear end of the caboose at that time. I had a lantern in my hand at that time, lighted, as well as I remember. I had my lantern lighted, as well as I remember, when I went down there; I don't remember having a conversation with you (Mr. Bowlin) when I was carrying the caboose down to where I was going—don't remember what was said, I remember the occasion; I don't know where I came from then; I first went to the eating house after I met you—after I met you I went down to the caboose: I did nothing then only staid there with the caboose until they came around with the engine and then went to where the test was made. Before the caboose was moved I don't remember noticing the lights on that caboose—red lights on the caboose; I don't remember seeing the red lights removed from that caboose. I didn't remove the lights if they were removed. The lantern I had I took with me and kept it; I kept it with me while I was on the engine and around the caboose.

When the caboose was left at the place where the test was made—left standing where we backed the engine up the main line and stopped it and then came back towards the caboose; we backed it up the main line about 250 yards; I was on the engine when it backed up there and stopped; my lighted lantern was sitting in the engine with me; the engine only staid there a short time before it was moved towards the caboose—probably two or three minutes, something like that; I staid on the engine; I don't remember when the headlight was turned on, on that engine; I suppose I was on the engine when it was turned on; I don't remember the exact time; I don't know whether it was turned on before it was backed up or when; I don't know whether I was on the engine when it
105 was turned on or not, or whether it was turned on before I got on the engine; I don't remember the incident of the light being turned on. In making the tests, I remember the light was on, but the exact time it was turned on I don't remember; I don't remember when it was turned on or off. I saw it shining on the ground first, and on the trees and to the right—to the right looking east and towards the caboose; I don't remember what kind of a light it did make, whether bright or otherwise; I don't remember noticing it. I remember being out on the running board of that engine; I don't remember what time that was with reference to the time the headlight was turned on. I remember the engine moving towards the caboose; I don't remember whether the headlight was on or off. As to whether the engine was first run up with the headlight off and then the headlight turned on and moved up again, I don't recollect. I have no recollection of the headlight at all; I am still in the employ of the company. I don't remember whether we made two advances towards the caboose with the engine or not; I remember making one all right. I don't remember who was on the engine when the test was made. Mr. Wylie was the man who handled the engine; he was the only man I saw handling the engine; he is here as a witness. I knew the engineer operating the engine making the test; I was brakeman down there when the test was made; I don't remember if there was a fireman on the engine when the test was made. I don't remember just how many there

were on that engine at the time the test was made—quite a number, probably four or five or six. I don't remember Mr. John A. Martin—I don't know the man—I don't know him by that name. Mr. Thompson there (attorney for defendant) was on the engine, I believe. I don't remember seeing Mr. Mann there; at that time I was not very well acquainted with him; I don't remember if he was in the engine or not.

Cross-examination:

I came in with the caboose that evening—I was on the train. To the best of my recollection when we came in we pulled right up the main line; I don't think we got off the main line before these tests were made. My recollection is the train was left on the main line; I had nothing to do with the tests—my attention was not called to it. I went down with the engine because I thought it was my business ot stay with it; that is the rule, when an engine is being
106 operated, for one brakeman or switchman to stay with it; that is the only purpose I had; the only business I had was to look after my engine as I was braking ahead; my conductor told me they wanted our engine; that they were going to take some observations; he says, "They are going to take our engine and make some observations." No one asked me to take any observations or to go with it; the engineer was just simply there to operate the engine; I made no memorandum whatever; nobody called my attention to look or make any observations. I said I saw Mr. Bowlin (attorney for plaintiff) there, up at the depot—near the depot. I think at that time I had my lantern lighted. I don't remember whether that was about sundown or a little before; I can't say. I had no idea just exactly how long we would be down there; as a general rule we stay there an hour or so. When I went down there with this engine west of the point of the accident I went to stay with my engine until it came back, if it had been until midnight; I don't remember whether it was dark enough for me to take my lighted lantern or not; I just remember picking my lamp up in the caboose when the engine was cut off, and I went on with the engine. We most always have our lamps lighted before we really need them, so as to have them ready when needed. I don't remember why I went out on the running board of that engine; I remember being there, though. I think I went over the running board to get to the pilot for some reason, though I don't remember what. I just went out there temporarily—just a minute or so. I never spoke to you (Mr. Thompson) on the occasion; I don't remember speaking to you, I remember seeing you there.

Redirect examination:

I don't remember whether I had my light out on the running board when I was out there or not; I don't remember whether I had it out there before the engine moved or not. There is no way that I can refresh my memory that I know of so that I can say whether I had my light out on the running board or not before the engine moved. I don't remember if I got my lighted lantern before I

went to lunch or not; I was on the front end of my train when I arrived there, and I think I went to the restaurant and then came back by the caboose. I don't remember who our engineer was at that time; Wylie was not our regular engineer. The engineer that we had in there did not handle the engine in making the experiments.

107 STANLEY BOYKIN, a witness for the plaintiff, being duly sworn, testified as follows:

After observing the sunset I remember going down near the west "Y"—walking west on the railroad track. I remember the cattle guard. When I first saw the caboose I believe it was east of this "Y" attached to some cars—east of the cattle guard and west of the "Y." When I observed the caboose I was sitting on the railroad embankment about fifty yards from the caboose—east of the caboose.

I observed a lighted lantern on the side of the caboose; it reflected light—I could see that it was lighted; that was about 7:30; I remember a man coming along and taking the lantern down; it was just a short time after I observed that until I took note of the time—just a few minutes. I didn't observe anything else about the caboose with reference to lights—I only saw a lighted lantern; I saw a man strike a match close to the end of the caboose; it reflected light; I could see the light plainly; I observed the caboose when it was moved down to where the tests were made; I observed the operation of the engine; the engine first moved the caboose and the backed off a considerable distance down the track and then came up towards the caboose and a man got on and turned on the headlight and then they came up real close to the caboose with the headlight still on and backed down the track a considerable distance and waited awhile and turned the headlight off and came on towards the caboose again. I observed a man come around the engine with a lantern. He came from the right-hand side, and seemed to do something to the headlight and the headlight came on immediately. I think he turned the headlight on when he came around with the lantern; at that time I was standing in the end of the caboose; the engine had come up rather close to the caboose—within 100 or 150 feet; this lantern that the man had reflected light; I saw the man come around the engine with the lantern. I could see it plainly. When the headlight was turned on it showed very brightly against the end of the caboose; at that time the engine was close to the caboose—I think the engine would be about in the center of the light. When the bright part of the headlight struck the caboose the engine was in 100 or 150 feet of it. Mr. Thompson stepped it, but I have forgotten exactly how much it was. (Witness refers to plat.) This would be to the right, looking east (indicating); the caboose was about here (indicating). As the engine came around the curve with

108 the headlight on, the main part of the light shone off in here (indicating), on some trees and on some people out there sit-ing down near the right-of-way fence. The side of the light struck the caboose, shining off this way (indicating); of course, as they got closer more and more light got on the caboose. It is an

electric light—I think it is, with a concave lenz. The headlight was turned on about 7:38, just a few minutes before they took it down to the bridge to come up to the caboose. The test was made at 7:45, and it was just a few minutes before that they backed the engine up close to the caboose.

Cross-examination:

I made some figures, or memorandum, at the time. I have not got them; they are in a note book that Mr. Bowlin has; we made figures of the distance from the roadbed to the right-of-way. I went out there at the request of Mr. Bowlin (attorney for the plaintiff); I went to make observations; I did not consider that any penal offense. He asked me to go and told me what he wanted me to go for; we got there in the morning and your (Mr. Thompson's) crowd came out in the afternoon on the next train. When I made the observations as to the sun going down, I was east of where the caboose was finally spotted, a good little ways from the track; at that time the caboose had not been placed down there. According to my time the sun went down behind the hill at 7:14; after that I staid on the railroad bank a few minutes while the trainmen were moving the caboose down and then walked on down towards the caboose. The engine brought the caboose down and left it at that place and then went down to where that little trestle is—right in that vicinity. When the engine started down there I could hardly see the engine—very barely see the engine. I was right by the caboose at that time. I watched the engine from the time it left the caboose until it went down to the bridge. Standing at the caboose I could see the engine down on the bridge—I could tell it was something there—I knew it was an engine, of course, as I had seen it go there. I couldn't tell whether anybody got on that engine till 4:40 or not. It was 7:38 when the engine backed up—came up close to the caboose and started back down towards the bridge. The engine first came up towards the caboose and then turned on the headlight, and the next time it came up the headlight was on. The first time it came up it stopped in about 150 feet of the caboose, I should say. The
109 headlight was then turned on; it is my recollection that we stepped the distance between these points—that you and I (Mr. Thompson and the witness) stepped it. It might have been counted by rails and it might have been twelve rail lengths. Twelve rail- would be 360 feet; it might have been that; it might have been a block away; after it came up and the headlight was turned on it backed down to the bridge; then the engine came up to the caboose with the headlight on. My recollection is the headlight was not turned on at the bridge; I am pretty sure of that; I didn't make any notation of that, but I am pretty sure of it. I remember the occurrence pretty well. I don't think it is a fact that the headlight was turned on down by the trestle and then it was moved up to this point—12 rail lengths from the caboose with the headlight on. The reason I remember the headlight was turned on near the caboose was because I saw a man come around with a lantern, and I know at that time it was near the caboose, I will say within 300 feet of it, or a

block or so. I don't think it had been turned on prior to that time down on the trestle; I am pretty sure of that; up at this point where the headlight was turned on the headlight shone against the end of the caboose. There was a slight curve there. When the headlight was first turned on it shone pretty fairly on the back end of the caboose; then it came up and shone quite plainly.

I stated that I have been in the weather bureau department. The length of twilight depends on the time of year and the atmospheric conditions and other things. I don't remember how long twilight lasts in May on a clear evening; that is given in tables the bureau had. It has been several years since I was in the bureau service; I did think it was 32 minutes, but I believe I am mistaken. I think I told Mr. Bowlin it was 32 minutes; I also told you (Mr. Thompson), but I afterwards told Mr. Bowlin I was mistaken. I have not looked up any tables; I just came to that conclusion from talking to Mr. Landis, who is in charge of the weather bureau here. I know in the summer time it is about thirty minutes from sundown until it begins to get dusk; I know in summer time we have a good deal of light usually after the sun goes down.

I stated that I saw a fellow strike a match; I saw the light flare up; I could see the man—I was in fifty or sixty feet of the man. It was clear enough to see a man sixty feet away; yes, I could see much further away at that time. It was just getting dusk; there is a period from sundown when it begins to get dark and then gets dark and then gets darker and darker until darkness—darkness approaches gradually, there is no standing still in this climate, it is gradual.

I feel pretty sure the headlight was not turned on until it got up to this point close to the engine. I saw a crowd get off the engine last time; they got off and came on up to the caboose; there was quite a crowd got off and came on up; there was quite a crowd around that caboose. The headlight shone full on the end of the caboose when they turned it on before they backed down to the bridge. I stated that it was first turned on in about 100 to 150 feet of the caboose, but it might have been a little further away; it was not very far; it is possible that it might have been as far as a block away. I didn't make any memorandum or measurement of that distance.

Redirect examination:

I remember now, since my memory has been refreshed—I remember now I was going to count the rails, and Mr. Bowlin called my attention to the fact that the engine was slowly moving backward. I also remember that we then made an estimate—after we found the engine was backing—moving backward, we made an estimate, but I don't remember what it was now; we made an estimate as to how far it was when the headlight was turned on; I did know, but I can't remember now; I can't remember about how many rails it was. When I started to the engine it moved before I got to it. I didn't count the rails; I commenced to count the rails and was looking down and Mr. Bowlin called my attention to the fact that the engine was moving back, and I looked up and it was. I don't believe I ever got to the

place where it was when the headlight was turned on. When this engine was coming up towards the caboose I noticed a man leaning out of the cab window; I saw one man lean out as far as he could on the right-hand side of the engine. I don't remember a conversation with Mr. Mann; I don't know Mr. Mann.

Recross-examination:

I state now that when Mr. Bowlin and I started to measure the distance between the engine and the caboose and the engine went back west and, therefore, we didn't finish it; I remember that. The time you (Mr. Thompson) stepped it is the time the engine came up last and staid there and quite a crowd of us stepped it off, I remember that.

111 C. C. PRATER, recalled by the plaintiff in rebuttal, testified as follows:

(Witness is shown bulletin testified to by the witness, J. W. Ward, as having been issued regarding the Yard Limit Board, at Thurber Junction.)

I never saw this bulletin testified to by Mr. Ward until yesterday. I began working for the Texas and Pacific Railway Company in February, 1906; I never knew anything of this until yesterday. I had no other rules except those contained in the time table under which I operated.

STANLEY BOYKIN, recalled by the plaintiff, testified as follows:

I spoke about a memorandum that was in the possession of Mr. Bowlin; that was a memorandum as to the distance from the track to the edge of the right-of-way and from the track to the trees on an air line from one end of the curve to the other. That was simply a measurement we had taken across this curve that evening with a tape line. That had no reference to any measurement taken at the time of the test.

Cross-examination:

I made no memorandum of the time the engine put on the headlight—no memorandum as to the time it came up and turned the headlight on. As to these things I am speaking purely from memory.

The plats shown by the evidence herein to have been exhibited to the various witnesses and jurors were put in evidence and are hereto attached. The plat or sketch of the plaintiff is marked on the back "M" and "B," and the blue print introduced by the defendant and identified by the witness, Reich, is also hereto attached and marked "T."

It is agreed that the said original plats and maps need not be copied by the clerk in making up the record, but that he may attach the original and send same up with the record, and upon a hearing on appeal said originals may be looked to and considered by the Court.

It is further agreed that the photographs shown by the record to have been exhibited to the various witnesses and the jury by the plaintiff and marked "M" and "B," may be sent up by the
112 clerk with the original transcript and considered by the Court on appeal; and it is likewise agreed that the photographs identified by Mr. Leffler and shown to have been exhibited to various witnesses and the jury and introduced in evidence, are marked "T" and attached hereto, and that the originals of same may be sent up by the clerk and considered by the Court on appeal.

It is also agreed that the various rules or train-rules shown by the evidence to have been read to the witnesses and to the jury were introduced in evidence, and that same were taken from a regular book or pamphlet of train rules published by the defendant, and all such rules as were read and referred to are correctly copied and set forth in the record, where same were directly introduced to read to the various witnesses, as shown by the bill of exceptions. (This does not apply to the bulletin testified to by Mr. J. W. Ward, issued on April —, 1903, and the effect and nature of same rests upon the testimony of the witness, Ward, and the testimony of the witness, Prater.

It is agreed that the above is a full, correct and substantial statement of all the facts introduced in this cause and the facts proven upon the trial thereof, and after the same had been introduced the Court charged the jury, as follows:

Charge of the Court.

"In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

No. 498.

C. C. PRATER
vs.
TEXAS & PACIFIC RY. CO.

Gentlemen of the Jury:

The plaintiff, C. C. Prater, sues the defendant, the Texas & Pacific Railway Company, to recover damages alleged to have been sustained by him by reason of personal injuries alleged to have been received by him while in the employ of the defendant as a locomotive engineer.

It is alleged that on the second day of May, 1908, while plaintiff was acting as such locomotive engineer and in charge of an engine and freight train, consisting of an engine and caboose, going east on defendant's line of railway near Thurber Junction, the de-
113 fendant, through its agents and servants, caused a freight train going in the same direction as the train on — plaintiff was locomotive engineer, to be stopped near Thurber Junction on the main track of said railway, it being then and there in the night time, and that the agents and servants in charge of said train so stopping on the main line did not have lights of any kind on the

rear end of said train It is alleged that the defendant was negligent in stopping said freight train at the point on the main line at which it did stop, and in failing to have lights on the rear car of said train. The plaintiff alleges that he was in the exercise of due care in the operation of the locomotive engine of which he was in charge, and that having discovered the train on the main track in front of him he started to alight from his locomotive engine, and that while he was in the act of so alighting his locomotive engine collided with the caboose of the standing train and caused him to be thrown to the ground and injured. He alleges his damages.

The defendant for answer to the petition of plaintiff denies each and all of the allegations contained therein, and for further answer says that plaintiff cannot recover in this action for the reason that he, himself, was guilty of negligence which directly caused and contributed to the accident. It avers that his negligence consisted in failing to be on the lookout to discover another train or car on the track over which he was running his engine; that at the time and immediately prior to the collision, plaintiff was running and operating his train or engine within what is known as the Yard Limits at Thurber Junction; that under and by virtue of the rules and custom of the company, and which were known to plaintiff, it was his duty while running his engine within such yard limits to have his train under control, expecting to find a train or car upon the track over which he was running, at any time; that his train should have been under such control that he could stop same immediately and avoid coming in contact with some standing train. It is alleged that notwithstanding such rule and custom and habit prevailing, the plaintiff negligently ran and operated his train so that just prior to the collision his train was not under control, but was running at such excessive rate of speed in violation of the rules, custom and practice that he was unable to stop same within the time prescribed; that had he looked or been on the lookout for the standing train or car, he could have discovered same in time to have avoided the accident and that had he been running his train at a careful rate of speed he could have stopped same in time to have avoided the accident, and
114 that such negligent acts on his part directly and proximately contributed to the accident resulting in his alleged injuries, if any.

Such, gentlemen, constitute the issues made in this case. In support of these issues evidence has been submitted before you; it is from such evidence and facts and circumstances in evidence that you must render your verdict, being governed by those rules of law which — applicable to the case and which I shall now give you.

Negligence, in a general sense, is an omission to perform a duty imposed by law for the protection of one's own person or property or that of another.

Contributory negligence is negligence not only upon the part of the one committing the injury, but also upon the part of him upon whom the injury was committed and by which they both contribute thereto.

Ordinary care is such care as an ordinary, prudent person would

exercise under similar circumstances. More than this the law does not require; less than this is negligence.

Upon the issue of the negligence of the defendant the burden is upon the plaintiff, and to entitle him to recover it must be shown to you by a preponderance or greater weight of the evidence that the accident resulting in his alleged injuries occurred substantially as alleged, and that his injuries were caused by reason of the negligence of the defendant company, and that he has been damaged as alleged.

The burden of proving that plaintiff was guilty of contributory negligence rests upon the defendant, and unless the defendant has shown by a preponderance or greater weight of the evidence that the plaintiff was guilty of negligence which contributed to the accident resulting in injury to him, the defendant would fail on its plea of contributory negligence.

The evidence is uncontroverted that plaintiff was in the employ of the defendant as a locomotive engineer on the second day of May, 1908; that on that date he was in charge of and operating a locomotive engine to which was attached a caboose going eastward on defendant's line of railway, toward Thurber Junction; that near and a short distance to the west of Thurber Junction the locomotive engine which plaintiff was operating ran into and collided with the rear end of a freight train which was on the main line of the defendant's track at that point. There is also evidence, and it is uncontroverted that there were no lights which the witnesses have referred to as "tail lights" displayed on the rear end of the train with which the locomotive engine in charge of the plaintiff col-
115 lided; that the point at which the collision occurred was within what are called the "Yard Limits" of Thurber Junction; that locomotive engineers operating trains on the defendant's line at that point and after passing the "Yard Limit Board" should have their engines and trains under control.

Much evidence has been admitted before you bearing upon the degree of light or darkness which obtained at the time and place of the collision; upon the distance at which the caboose or rear car of the standing train could be seen from the cab of the locomotive engine in charge of the plaintiff; upon the question as to what rate of speed the engine in charge of plaintiff was moving when it passed the yard limit board and as it approached the standing train; upon the question as to what conditions must obtain in the operation of a train to have same considered and deemed to be under control. Evidence has been introduced on other controverted points, but I will not undertake to review all of them.

Now, if you believe from the evidence that the defendant, through its agents and servants in charge of same, stopped the train with which the locomotive engine being operated by the complainant collided on the main track of the defendant's railway line, and if you believe that in the exercise of ordinary care the operatives of said standing train should have placed lights as signals on the rear end of the rear car of said train, and if you further believe that in failing to have lights placed as signals on the rear end of the rear car of said train, and if you further believe that such negligence was the

proximate cause of the collision between the said trains and resulting accident, and if you further believe that plaintiff suffered personal injuries by reason thereof, then and in that event you will find for the plaintiff, unless you further believe from the evidence that he, himself, was guilty of negligence in the operation of his engine which contributed to the accident resulting in his injuries.

In reaching your conclusion as to whether it was necessary in the exercise of reasonable and ordinary care, to have rear or tail lights on the rear of the rear car of said standing train, you will take into consideration the relative degree of light or darkness on the occasion in question. If you should believe it was not reasonably necessary under the conditions obtaining, then the failure on the part of the defendant would not be negligence.

If you believe from the evidence that the plaintiff after passing the yard limit board at Thurber Junction and as he approached the train standing on the main lines, failed to have his engine
116 under control, and if you believe that plaintiff in so failing was guilty of negligence, and if you further believe that such negligence on his part directly caused or contributed to the accident resulting in his injuries, or, if you believe from the evidence that Prater after reaching the yard limit board at the time and on the occasion in question, did not put his engine under control and keep same under control in approaching the place of the accident, and if you believe that he was negligent in failing so to do, and if you further find that had such engine been under control and that he, Prater, with such engine under control could have seen the caboose in time to stop his engine before striking same, then and in either of such events he cannot recover and the jury will find for the defendant, even, though they may find that the defendant was guilty of negligence.

If you believe from the evidence that as the locomotive engine being operated by the plaintiff, Prater, approached the rear end of the train on the main track, the brakeman, Bargar, gave plaintiff a signal, and afterwards went down the track giving him the stop signal, and if you find that Prater by the use of ordinary care on his part could and should have seen such signal, and if by having his engine under control he could, after discovering such signals, stop his train in time to avoid any injury to himself, then and in such event he would be guilty of negligence, and cannot recover in this case, even, though the defendant was guilty of negligence."

The Court further charged the jury that, if under the issues submitted, they found for plaintiff, to allow him such sum of money as would reasonably compensate him for the injuries received; and then proceeded to define the measure of damages. It is agreed that the charge of the Court as to the measure of dam[illegible]ges was correctly stated.

117 After the Court had given its charge to the jury, the defendant asked the Court to give the following Special Charge No. 1:

In the United States Circuit Court for the Northern District of Texas.

No. —.

C. C. PRATER
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

In this case the Court instructs the jury that, under the evidence, plaintiff cannot recover and they will return a verdict for the defendant."

The Court refused this charge, to which action the defendant, by attorney, in open Court and before the jury had retired, excepted.

The defendant also in open Court and after the Court had given its charge to the jury and before the jury had retired, excepted to the action of the Court in submitting the case to the jury, upon the ground that under the evidence the Court should have instructed the jury to find for the defendant. The defendant also in open Court and before the jury had retired, excepted to the action of the Court in submitting to the jury the issue as to whether or not the plaintiff was guilty of contributory negligence, upon the ground that the Court should have charged the jury that upon the evidence plaintiff was, as a matter of law, guilty of contributory negligence directly causing and contributing to his injuries.

Thereupon, the jury retired and after consideration of the evidence and charge of the Court, returned the verdict which is copied in the record.

The defendant filed its original motion for a new trial on the 20th day of November, 1909, and afterwards, to-wit, on the 6th day of December, 1909, filed its amended motion for a new trial, which said amended motion was presented to the Court on the 3rd day of January, 1910, and overruled. Said amended motion for a new trial is copied in the record and is as follows:

118 Defendant's amended motion for new trial, heretofore printed at page 18.

* * * * * * *

The Court, on the third day of January, 1910, same being the day said motion for a new trial was overruled, upon the prayer of the defendant, entered an order granting the said defendant sixty days from the adjournment of said term of Court within which to prepare and file its bills of exception.

The defendant here now tenders this, its bills of exception, embracing all of the foregoing matters, and asks that the same be allowed by the Court and filed as a part of the record in this cause.

SPOONTS, THOMPSON & BARWISE,
Attorneys for Defendant, The Texas & Pacific Railway Company.

We agree that the above and foregoing is a true and correct bill of exceptions.

This 1st day of March, 1910.

McCART, BOWLIN & McCART AND
R. M. WYNNE,
Attorneys for Plaintiff, C. C. Prater.

Allowed:

EDWARD R. MEEK,
United States District Judge, Presiding.

Indorsed: No. 498. C. C. Prater vs. Texas & Pacific Railway Co. Bill of Exceptions. Filed 2 day of March, 1910. Louis C. Maynard, Clerk; by E. C. Van Dusen, Deputy.

119 *Petition for Writ of Error.*

Filed March 2, 1910.

In the Circuit Court of the United States for the Northern District of Texas at Fort Worth.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
C. C. PRATER, Defendant in Error.

To the Judges of the Circuit Court of the United States in and for the Northern District of Texas, at Fort Worth:

Your petitioner, The Texas & Pacific Railway Company, a corporation duly incorporated by and organized under and [an] Act of Congress of the United States, respectfully represents:

That at the November term (1909) of this Court, to-wit, on the — day of November, 1909, C. C. Prater, defendant in error, recovered a judgment against your petitioner, in the sum of three thousand dollars ($3,000.00) with interest at the rate of six per cent. from the date thereof, and all costs of suit in said proceeding, for the recovery of which and in the rendition of which there was and is manifest error, to the great prejudice of petitioner. That plaintiff, C. C. Prater, resides in the State of Texas, in Tarrant County, and his attorneys of record are McCart, Bowlin & McCart, residents of Tarrant County, Texas.

That petitioner has filed in this Court its assignments of error, and here presents same for the inspection of this Court.

Wherefore, petitioner prays that it be granted a writ of error, to remove said judgment and proceedings had in said cause to the United States Court of Appeals for the Fifth Circuit, to be held at New Orleans, Louisiana, for revision, correction and reversal, and your petitioner will ever pray.

——— ———,
Attorneys for Defendant.

Allowed:

EDWARD R. MEEK,
United States District Judge, Presiding.

Indorsed: In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth. The Texas & Pacific Railway Company, Plaintiff in Error, vs. C. C. Prater, Defendant in
120 Error. Petition for Writ of Error and Allowance. Filed 2 day of March, 1910. Louis C. Maynard, Clerk; by E. C. Van Dusen, Deputy.

Know all men by these presents, That we, The Texas & Pacific Railway Company, as principal and as sureties, are held and firmly bound unto C. C. Prater, in the full and just sum of six thousand ($6,000.00) dollars, to be paid to the said C. C. Prater, and his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this — day of March, ——, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a session of the United States Circuit Court for the Northern District of Texas, at Fort Worth, in a suit depending in said Court, between C. C. Prater, as plaintiff, and The Texas & Pacific Railway Company, as defendant, a judgment was rendered against the said The Texas & Pacific Railway Company, defendant, for $3,000.00 and interest at 6% from date of judgment, and all costs of suit, and the said The Texas & Pacific Railway Company, defendant, having obtained a Writ of Error, and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said C. C. Prater, plaintiff, citing and admonishing the said C. C. Prater to be and appear at a United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, in not exceeding thirty days from — day of ——, 190–.

Now, the condition of the above obligation is such, that if the said The Texas & Pacific Railway Company, defendant, shall prosecute its said appeal to effect, and answer all damages and costs if it should fail to make its said plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of:

THE TEXAS & PACIFIC RAILWAY CO.,
[SEAL.] By GEO. THOMPSON, *Its Att'y.*
[SEAL.] R. H. STEWART, *Surety.*
[SEAL.] F. R. SUNNY, *Surety.*

Approved as a Supersedeas Bond.

EDWARD R. MEEK,
United States District Judge.

121 [Indorsed:] No. 498. C. C. Prater vs. The Texas & Pacific Railway Company. Bond. On Appeal. Filed 2 day of March, 1910. Louis C. Maynard, Clerk; by E. C. Van Dusen, Deputy.

* * * * * * *

Clerk's Certificate.

I, Louis C. Maynard, clerk of the Circuit Court of the United States for the Northern District of Texas, do hereby certify that the above and foregoing is a full, true and correct copy of the transcript, assignments of error, bill of exceptions and all other papers in Cause No. 498 Law, wherein C. C. Prator is plaintiff and the Texas and Pacific Railway Company is defendant, except that the original writ of error and citation in error are included therein instead of copies thereof, as fully as the same remain on file and of record in my office at Fort Worth, Texas.

Witness my hand officially and the seal of the Circuit Court of the United States for the Northern District of Texas, at Fort Worth, this the 26th day of April, A. D. 1910, and of American independence the 134th year.

[SEAL.]

LOUIS C. MAYNARD, *Clerk*,
By E. C. VAN DUSEN, *Deputy*.

122 *Argument and Submission.*

No. 2084.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
C. C. PRATER.

Nov. 14, 1910.

On this day this cause was regularly called, and after argument by Geo. Thompson, Esq., for plaintiff in error, and C. R. Bowlin, Esq., for defendant in error, was submitted to the court.

123 U. S. Circuit Court of Appeals. Filed Dec. 6, 1910. Charles H. Lednum, Clerk.

Opinion.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2084.

TEXAS & PACIFIC RAILWAY COMPANY
v.
C. C. PRATER.

Error to the Circuit Court of the United States for the Northern District of Texas.

Before Pardee, McCormick, and Shelby, Circuit Judges.

By the COURT:

After analyzing the evidence and citing adjudged cases counsel for plaintiff in error submits his contention on this writ as follows:

"We place our prayer for reversal of this cause upon the broad principle that, admitting the servants of the railroad company were negligent with reference to failing to have the light from the rear end of the standing caboose, yet, taking the undisputed evidence and in connection with the physical facts, the Court should have instructed or held that Prater was guilty of contributory negligence in permitting his engine to come in contact with said standing caboose, and instructed the jury that on account of such contributory negligence and acts he was not entitled to recover; and, having failed in this respect, a new trial should have been granted as a matter of law upon the evidence."

From our examination of the record, we fail to find "the undisputed evidence" which "in connection with the physical facts" shows that Prater was guilty of contributory negligence; certain it is, that Prater and his witnesses testify that on passing the
124 western yard limit board at Thurber station, he put his train under control, as "putting under control" is defined by the witnesses; that Prater expected and had some right to expect that any car or engine standing at dark or after, on the main track within the yard limits, would show a red light; that the time was after sundown and the sky-light dark and cloudy; that there were hills along the track and curves in the track, particularly one near the collision, which hindered Prater from seeing the unlighted caboose until within colliding distance.

As to the physical facts proved, mainly relating to distance and directions at which other parties could see what Prater says he did not see at the time of the collision, they may throw doubt upon Prater's evidence, but do not overthrow it as a matter of law.

It may be that the result in this case is to reward a negligent engineer whose carelessness contributed to his injury and that such result is against the interest of the railroads, their employés, and the general traveling public; but this was a matter for the trial Judge and jury and is outside of our cognizance on this writ.

On the record it is our duty to affirm the judgment,—

And it is so Ordered.

125 *Judgment.*

No. 2084.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
C. C. PRATER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Texas, and was argued by counsel.

On consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the sureties on the writ of error bond herein, R. H. Stewart and C. R. Buddy be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

Dec. 6, 1910.

126 *Petition for Writ of Error and Order Allowing.*

United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
C. C. PRATER, Defendant in Error.

Petition for Writ of Error.

Your petitioner, The Texas & Pacific Railway Company, Plaintiff in Error, in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit, and a judgment has therein been rendered on the 6 day of December, 1910, affirming the judgment of the Circuit Court of the United States for the Northern District of Texas, and that the matter in controversy in said suit exceeds One Thousand Dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is, or was, dependent in anv wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of the different States, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case; that said petitioner is a railway corporation duly incorporated under and by virtue of the laws of the United States, to wit: an act of Congress of the United States, approved March 3, 1871, entitled "An Act to incorporate The Texas Pacific Railroad Company, and to aid in the construction of its road and for other purposes," and acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872; March 3, 1873, and June 22, 1874; and that this is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore, your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected, according to the law and customs of the United States.

THE TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*
By W. L. HALL, *Its Attorney.*

127 The foregoing petition is granted, and writ of error allowed, as prayed for, upon plaintiff in error giving bond, according to law, in the sum of Six Thousand ($6,000) Dollars.

DAVID D. SHELBY,
Judge of the United States Circuit Court of Appeals of Fifth Circuit.

The foregoing has the following indorsements to-wit: No. 2084. United States Circuit Court of Appeals for the Fifth Circuit. The Texas & Pacific Railway Co., Plaintiff in Error, vs. C. C. Prater, Defendant in Error. Petition for writ of error.

Filed 29 day of Dec. 1910. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

128 *Assignments of Error.*

United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
C. C. PRATER, Defendant in Error.

And now comes the plaintiff in error, The Texas & Pacific Railway Company, by its attorney, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Fifth Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error, in this, to wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Northern District of Texas, for the sum of Three Thousand Dollars, and costs of suit, entered on the 11th day of November 1909, in favor of said defendant in error and against said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing the judgment of the said United States Circuit Court aforesaid, in not remanding said cause to said Circuit Court for a new trial.

Third. Said Circuit Court of Appeals erred in not reversing the judgment of the said United States Circuit Court aforesaid, and in not directing that judgment for said defendant in error be entered in its behalf.

Fourth. Said Circuit Court of Appeals erred in not sustaining the first assignment of error presented to it, upon the record in the said cause, and which complained of the error of the said Circuit Court in refusing to give special charge No. 1, asked by the plaintiff in error in the trial court, and which requested said trial court to instruct the jury to find for the defendant.

Fifth. Said Circuit Court of Appeals erred in not sustaining the second assignment of error upon the record in said cause, which complained of the action of the United States Circuit Court in sub-

mitting to the jury, for its finding, the question as to whether or not C. C. Prater, plaintiff below, was guilty of contributory negligence.

Sixth. Said Circuit Court of Appeals erred in not sustaining the third assignment of error upon the record in said cause, which complained of the action of the trial court: to wit, the United
129 States Circuit Court, in not instructing the jury that C. C. Prater could not recover, for the reason that the undisputed proof showed conclusively that he, the said C. C. Prater, as shown by the evidence, directly caused and contributed to his injury.

Seventh. The said Circuit Court of Appeals erred in not sustaining the fourth assignment of error upon the record in said cause, which complained of the action of the trial court in submitting to the jury the issue as to whether or not C. C. Prater was guilty of contributory negligence.

Eighth. The said Circuit Court of Appeals erred in not sustaining the fifth assignment of error upon the record, which complained of the action of the United States Circuit Court in not granting a new trial in this cause, based upon the proposition that the undisputed evidence showed that Prater, at the time he approached the caboose, and train to which it was attached, was guilty of negligence in not having his train under control, and in failing to be on the lookout, and discover the standing caboose.

Ninth. The said Circuit Court of Appeals erred in its judgment and conclusion in holding that the issue of contributory negligence on the part of Prater was one which should have been submitted to the jury and its findings in that respect having been approved by the trial judge, the said Circuit Court of Appeals had no power to review same.

Tenth. The said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error in favor of said defendant in error, for costs of suit in the said Circuit Court of Appeals.

Wherefore, the said The Texas & Pacific Railway Company, plaintiff in error, prays that for the errors aforesaid, and other errors, appearing in the record of said United States Circuit Court of Appeals, in the above entitled cause, to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States Circuit Court for the northern district of Texas, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

W. L. HALL,
Attorney for Plaintiff in Error.

The foregoing has the following indorsements to-wit: No. 2084. United States Circuit Court of Appeals for the Fifth Circuit. The Texas & Pacific Railway Co., Plaintiff in Error, vs. C. C. Prather, Defendant in Error. Assignments of Error. Filed 29th day of Dec. 1910. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

130 *Bond.*

United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
C. C. PRATER, Defendant in Error.

Know all men by these presents, that we, The Texas & Pacific Railway Company, as principal, and —— —— and —— ——, as sureties are held, and finally bound unto C. C. Prater, in the full and just sum of Six thousand ($6,000.00) Dollars, to be paid to the said C. C. Prater, his certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this the 31st day of December A. D. 1910, in the year of our Lord, One Thousand Nine Hundred and —.

Whereas, lately, at a Circuit Court of Appeals for the Fifth Circuit, in a suit pending in said court between The Texas & Pacific Railway Company, plaintiff in error, and C. C. Prater, defendant in error, a judgment was rendered against the said Texas & Pacific Railway Company, and the said Texas & Pacific Railway Company having obtained a writ of error, and filed a copy thereof in the Clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said C. C. Prater, citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 28th day of Jan'y, 1911.

Now, the condition of the above obligation is such that if the said The Texas & Pacific Railway Company shall prosecute
131 said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS & PACIFIC RY. CO.,
By W. L. HALL, *General Att'y.*
EDW. O. TENISON.
FRED HARRIS.

Sealed and delivered in the presence of
C. C. HALL,
E. W. MERRITT.

Approved by
DAVID D. SHELBY,
Judge of the United States Circuit Court of Appeals for the Fifth Circuit.

I, Louis C. Maynard, Clerk of the Circuit Court of the United States for the Northern District of Texas, do hereby certify that I have examined the foregoing bond and that the sureties signing same are good and solvent and worth more than the amount specified over and above their exemptions and liabilities and if said bond were presented to me for approval that I would approve the same.

In witness whereof, I hereunto sign my name and affix the seal of said Court this the 31st day of December, A. D. 1910.

[SEAL.] LOUIS C. MAYNARD, *Clerk.*

The foregoing has the following indorsements to-wit: No. 2084. United States Circuit Court of Appeals for the Fifth Circuit. The Texas & Pacific Railway Co., Plaintiff in Error, vs. C. C. Prater, Defendant in Error. Bond. Filed 2 day of Jany. 1911. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

132 THE UNITED STATES OF AMERICA:

The President of the United States to C. C. Prater, of Tarrant County, Texas, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court of Appeals for the Fifth Circuit, wherein The Texas & Pacific Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Edward Douglass White Chief Justice of the United States, this 29 day of December, in the year of our Lord One Thousand Nine Hundred and ten.

DAVID D. SHELBY,
Judge of the United States Circuit Court of Appeals for the Fifth Circuit.

We hereby accept service of this citation in error, and waive copy of same, and enter our appearance as if duly and legally served.

This 4th day of January 1911.

C. R. BOWLIN,
Attorneys for C. C. Prater, Defendant in Error.

133 [Endorsed:] 2084. United States Circuit Court of Appeals for the Fifth Circuit. The Texas & Pacific Railway Co., Plaintiff in Error, vs. C. C. Prater, Defendant in Error. Citation in error. Filed 29 day of Dec., 1910. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

134 THE UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between the Texas & Pacific Railway Company, plaintiff in error, and C. C. Prater, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 29 day of December In the year of our Lord One Thousand Nine Hundred and ten.

[Seal of United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the Circuit Court of Appeals of the United States, Fifth Circuit.

Allowed by
DAVID D. SHELBY,
Judge of the United States Circuit Court of Appeals for the Fifth Circuit.

It is hereby certified that a copy of this writ is this day lodged in the Clerk's Office for the use of the defendant in error, 29th day of December, 1910.

CHARLES H. LEDNUM, *Clerk.*

135 [Endorsed:] Original. 2084. United States Circuit Court of Appeals for the Fifth Circuit. The Texas & Pacific Railway Co., Plaintiff in Error, vs. C. C. Prater, Defendant in Error. Writ of Error. Filed 29 day of Dec., 1910. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

136 United States Circuit Court of Appeals, Fifth Circuit.

I, Charles H. Lednum, Clerk of the United States Cir- court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages contain a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had, including the opinion

of the court, except fifteen certain exhibits consisting of photographs, sketches and blue prints, which cannot be reproduced by this office, in the case of The Texas & Pacific Railway Company, Plaintiff in Error, versus C. C. Prater, Defendant in Error, No. 2084, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the city of New Orleans, Louisiana, this 7th day of January, A. D. 1911.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No. 22,492. U. S. Circuit Court Appeals, 5th Circuit. Term No. 211. The Texas & Pacific Railway Company, plaintiff in error, vs. C. C. Prater. Filed January 27th, 1911. File No. 22,492.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1912

No. 211

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

C. C. PRATER, Defendant in Error.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

C. C. Prater, defendant in error, brought suit against the Texas & Pacific Railway Company, plaintiff in error, in the District Court of Tarrant County, Texas, to recover damages in the sum of Twenty-Five Thousand ($25,000.00) Dollars, for personal injuries alleged to have been received by him on the second day of May, 1908, while in the service of the railway company as engineer, which injury is alleged to have occurred near Thurber Junction. (R. 2-3).

For convenience's sake the plaintiff in error will herein be designated as "the railway company," and the defendant in error as "Prater."

The railway company filed its petition and bond for removal to the Circuit Court of the United States for the Northern District of Texas, which was granted, and the case was filed in said court. (R. 5-8).

By his amended petition in the Circuit Court of the United States, Prater alleged that just prior to the accident

he was an engineer, operating an engine with caboose attached, and that as he got near Thurber Junction and station, another freight train going in the same direction (east) was standing on the main line track and not at a regular stopping place for trains. That said standing train did not have any lights of any kind on the rear end of caboose of said train, and that no flagman had been sent back to give warning to his approaching engine, and that no torpedoes had been placed upon the track, to advise him of the fact that another train was standing on the main line, and that no warning of any kind was given him of the standing train, the omissions to do all of such things were alleged to be negligence, and that thereby, while approaching said standing train, and without any fault on his part, and with his train under control he was unable to discover the fact that said train was so standing, and that thereby the engine in charge of Prater was caused to collide with said train, causing him to receive personal injuries, to his damage in the sum of Twenty-five Thousand ($25,000.00) Dollars.

By answer, the railway company plead a general denial of the allegations in the petition, and further that Prater could not recover for the reason that he himself was guilty of negligence, which directly caused and contributed to the accident:

First, in failing to be on the lookout to discover any other train or car on the track over which he was running his engine.

Second, in not having some other person, or persons to be on the lookout to discover said train.

Third, that he was at the time running and operating his train or engine within what was known as the yard limits of Thurber, and that under the rules and customs of the company, which were well known to him, it was his duty to have said engine, while within said yard limits, under control, expecting to find a train, or cars, standing on the track over which he was running, at any time. That his train should have been under control, so that he could stop same immediately and avoid coming in contact with any standing train,

and that notwithstanding such rule, custom and habit prevailing, he negligently ran and operated his train so that just prior to the accident same was not running under control, but was running at such excessive rate of speed that he was unable to stop same within the time prescribed.

That had he been on the lookout for a standing train, he could have discovered same at any time to avoid the accident, and had he been running his train at a careful rate of speed he could have stopped it in time to avoid the accident.

Also that he was negligent in not stopping his train after he should have known that there was danger of coming in contact with any car or train. That he knew, or should have known, that trains were liable to be on the track over which he was operating his engine, and that it was his duty to operate same with reference thereto, and to be on the lookout for such cars or trains, and to have his train running at such speed as that he could stop the same without coming in contact with such cars, and that he failed in such respects, which directly caused and contributed to his injuries.

Further plea was had with reference to the alleged rule as to sending back a flagman and torpedoes, but same was not submitted by the Court as a ground of negligence. (R. 15-16).

A trial of the case was had in the Circuit Court of the United States for the Northern District of Texas, at Fort Worth, on November 11, 1909, and judgment rendered in favor of the plaitniff, C. C. Prater, for $3,000.00. (R. 15).

The District Judge submitted to the jury the issue of negligence of the Railway Company as to its failure to have a light on the rear end of the caboose, and also the contributory negligence of Prater. (R. 90-92).

At the proper time by special charge the Railway Company asked the Court to instruct the jury that under the evidence the plaintiff could not recover and for them to return a verdict for the defendant, which charge was refused and exception duly taken. (R. 93).

The Railway Company also in open court and at the proper time duly excepted to the action of the Court in submitting the issue as to whether or not Prater was guilty of contributory negligence to the jury, upon the ground that the Court should have instructed the jury that under the evidence Prater was, as a matter of law, guilty of contributory negligence directly causing and contributing to his injuries. (R. 93).

By proper motion the Railway Company asked for a new trial based upon the action of the Court in refusing to grant Special Charge No. 1 and that the verdict was contrary to the great weight of the evidence in that it appeared that Prater was guilty of contributory negligence in the matters and things set forth in said charge. (R. 15-16).

The record having been properly filed in the United States Circuit Court of Appeals for the Fifth Circuit, the Railway Company by proper assignments or error asked for a reversal of the case, based upon the action of the trial court in refusing to give its Special Charge No. 1 which requested the Court to instruct the jury to find for the defendant, and upon the error of the trial court in submitting to the jury for its finding the question as to whether or not Prater was guilty of contributory negligence, based upon the allegation that the Court should have held as a matter of law said Prater was guilty of contributory negligence. (R. 17-18).

On November 14, 1910, the case having been regularly heard by the Circuit Court of Appeals of the Fifth Circuit, the judgment below was affirmed in a memoranda opinion. (R. 96).

The Railway Company has by proper proceedings brought the case before this Court for review, on assignments of error as follows:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Northern District of Texas, for the sum of Three Thousand Dollars, and costs of suit, entered

on the 11th day of November, 1909, in favor of said defendant in error and against said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing the judgment of the said United States Circuit Court aforesaid, in not remanding said cause to said Circuit Court for a new trial.

Third. Said Circuit Court of Appeals erred in not reversing the judgment of the said United States Circuit Court aforesaid, and in not directing that judgment for said defendant in error be entered in its behalf.

Fourth. Said Circuit Court of Appeals erred in not sustaining the first assignment of error presented to it, upon the record in the said cause, and which complained of the error of the said Circuit Court in refusing to give Special Charge No. 1, asked by the plaintiff in error in the trial court, and which requested said trial court to instruct the jury to find for the defendant.

Fifth. Said Circuit Court of Appeals erred in not sustaining the second assignment of error upon the record in said cause, which complained of the action of the United States Circuit Court in submitting to the jury, for its finding, the question as to whether or not C. C. Prater, plaintiff below, was guilty of contributory negligence.

Sixth. Said Circuit Court of Appeals erred in not sustaining the third assignment of error upon the record in said cause, which complained of the action of the trial court: to-wit, the United States Circuit Court, in not instructing the jury that C. C. Prater could not recover, for the reason that the undisputed proof showed conclusively that he, the said C. C. Prater, as shown by the evidence, directly caused and contributed to his injury.

Seventh. The said Circuit Court of Appeals erred in not sustaining the fourth assignment of error upon the record in said cause, which complained of the action of the trial court in submitting to the jury the issue as to whether or not C. C. Prater was guilty of contributory negligence.

Eighth. The said Circuit Court of Appeals erred in not

sustaining the fifth assignment of error upon the record, which complained of the action of the United States Circuit Court in not granting a new trial in this cause, based upon the proposition that the undisputed evidence showed that Prater, at the time he approached the caboose, and train to which it was attached, was guilty of negligence in not having his train under control, and in failing to be on the lookout, and discover the standing caboose.

Ninth. The said Circuit Court of Appeals erred in its judgment and conclusion in holding that the issue of contributory negligence on the part of Prater was one which should have been submitted to the jury and its findings in that respect having been approved by the trial judge, the said Circuit Court of Appeals had no power to review same.

Tenth. The said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error in favor of said defendant in error, for costs of suit in the said Circuit Court of Appeals.

Wherefore, the said The Texas & Pacific Railway Company, plaintiff in error, prays that for the errors aforesaid, and other errors, appearing in the record of said United States Circuit Court of Appeals, in the above entitled cause, to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States Circuit Court for the Northern District of Texas, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

STATEMENT OF EVIDENCE.

In support of the assignments of error presented, we copy from the record the material facts bearing upon the accident.

Prater, the injured party, testified to having been a locomotive engineer of 23 or 24 years experience. That on the second day of May, 1908, he left Baird, Texas, with an

engine and caboose attached, and so operated said engine and caboose until the time of the accident near Thurber Junction. Baird is 63 miles west of Thurber Junction, and he left there about 4:20 p. m. That his engine was about 162 ton engine, about 15 feet from the ground to the top of the boiler, which was 33 feet long from the head to the front end. That from his seat in the cab, and where his feet were, to the top of the boiler was six feet six inches; there was a running board, which extends from the cab along by the side of the boiler, back into the cab, and made the floor of the cab.

That in approaching the point of collision, on reaching the yard limit board he reduced the speed of his engine down to between 6 and 8 miles per hour. That he understood from the rules requiring trains to be under control that it must be running so that when you came into a station or yard, you could stop on a danger signal, within a reasonable distance. That as he approached the place of the accident his engine was drifting; that in approaching that place he kept a lookout as far as he could looking ahead; that he was lying out of the cab window all of the time until he passed over the bridge, which was his whistling place for the station, he dropped back into the seat and looked straight ahead, and then he reached up for the whistle cord, and whistled for the station, and then just as he did that, the fireman said, "Look out, hold her," or something of that kind; that he turned the whistle cord loose and jammed the air in emergency, and threw his head to the right, and just as he did, he could see the right corner of the caboose. That he turned and threw his legs around to the side of the box to slide off; that it was something unusual to see a train out there without red lights or flag, and he presumed some cars had gotten away and were drifting back on him. That he first saw a brakeman running out of the caboose door, and he saw the caboose rolling, and he did not wait any longer. That he ran to the left to get off, and just as he got hold of the hand-hold, and went to drop from the first to the second deck, the collision occurred. (R. 40-43).

He then described his injuries:

He said that he did not think that the head of his train could have been more than forty feet from the caboose when the fireman gave the alarm; he did not think it was over thirty to thirty-five feet from the engine to the caboose when he first saw it. That he could just see the corner of the caboose when the brakeman ran out, that he thought there was about a twenty foot space between the engine and the caboose when the brakeman ran out of the caboose door.

That in going around the curve at the scene of the accident, he was on the right side of the engine and the fireman was on the left, and he could not have seen the caboose he ran into over the boiler from his position in the cab coming around the curve. The reason he could not have seen it was that the boiler was over his head. That there were two windows to the cab, the front window and a side window. That he was at the front window ordinarily in keeping a lookout. That had it been daylight he could have seen the caboose he ran into on that curve not over two car lengths, if that. That he would have had to lean out of the cab window on the side. At night, under the condition the weather was then, and the darkness, he thought he saw the caboose just as far as it could be seen. That he had his head right over against the cab and could just see the right corner of the caboose. That the reflection of the headlight caused him to see it. That the main rays of the headlight were shining to the right, across the right of way. That it was not on the track, would flicker on the caboose. That the headlight was stationary, and did not follow the curve. When he saw the brakeman run out of the caboose door he saw the caboose roll, which indicated to him that the caboose was drifting back or moving back of him. He felt positive the train was coming back on him, and would always believe it was. That he could not swear positively that it was because he did not stay there long enough. That he thought his life was in danger. He did not notice how long he stayed on the ground, but noticed the state of the weather, that it was cloudy, and he had noticed be-

fore reaching Thurber that it looked like threatening rain. (R. 50-53).

That an engineer can keep a lookout, and usually keeps a lookout through the front window, but in rounding curves he looks out the side window as far as he can. That at the place of the accident there was only one track, that there was a hill on each side of the track, and heavy timber, that on coming on this curve west of him, and to his back, was down grade, and that if a man did not try to stop his train it would roll up to Thurber. That in approaching the place of the accident he did not see any flagman or signal. (R. 43-44).

CROSS-EXAMINATION.

That in approaching the yard limit board from the west up to the point of the accident, the timber he spoke of on either side of the railroad, some of it was scrubby, some low, some stood on the hill and was pretty high, he was unable to say how high it is from the yard limit board extending across the trestle and to the point of the accident. He was shown some photographs which will be referred to later on.

Further, that the headlight was on the front end of the boiler, and the pilot ahead of that. That the gang plank or running board extends from the cab out by the side of the boiler to the end of the boiler. The cab windows open inside and he supposed it to be 5 or 6 inches higher than the running board. That it was six or seven feet from the back seat in the cab to the front window. That he was sitting on his seat in the cab looking straight ahead through the window that carried his line of vision right along by the side of the boiler. That there was a sliding window on the side, and that he sometimes put his head out and looked ahead. (R. 55-56).

That after leaving Cisco he did not know the Varney train (which was the one standing, and into which his engine ran) was ahead of him until he got to Ranger, when he knew that there was another train ahead of him somewhere. That he did not see the train until he came around

the curve. That at Thurber there was a branch road extending to the mines some four or five miles; that it was a common thing for trains to come in from the mines loaded with coal, that they came down, and set their trains out there, but did not come out on the main line. That they backed out on the Y's but always did it under protection. That Thurber Junction was a place where they frequently stopped trains and turned them there.

He gives the time of the accident, according to his recollection, as 7:55 p. m. (R. 56).

He further testified that he passed the yard limits at between 6 and 8 miles an hour, having checked the speed down to about that rate upon reaching the yard limit board, and continued at that rate until the accident occurred. That he was looking ahead all the time after he passed the yard limit board until he passed over the little bridge, which was about his whistling station. That his headlight, which was burning, was an electric headlight, and that it flared or broadened out, and would not throw the light more than 35 to 40 or 50 feet ahead of the engine, but on a dark night he supposed the light would shine 100 to 150 yards with the hedalight focused down on the track. That he supposed he could see the rails something like 100 yards looking out through the window on a straight track. That he did not observe the degree of darkness as he went down there (approaching the place of the accident) on each side of the track. That as soon as the fireman hollered, he put the air on, and got down as soon as he could get down, which was all he did with reference to stopping the train.

In answer to the question as to how far he was from the caboose when the fireman hollered, he said "between 30 and 35 feet from where he could see the right corner of the caboose from the place where he was sitting." That, however, was qualified by saying that he meant there was that much distance btween the front end of his engine and the caboose. That he did not see the brakeman who ran out of the caboose door have any light, if he had a light he would have seen it. He saw him by the reflection of his headlight; that he does not believe he could have seen the caboose any fur-

ther back than he did. That when the fireman hollered "look out" he looked through the front window of the cab and saw the corner of the caboose, and as he came around facing east he saw the brakeman come out of the door; the caboose seemed to be moving. He then turned back the other way and ran and climbed down to the point he described. That he jumped from his seat across to the left and ran across to the north side to get off. That he did not get off from the south side because he could get across there quicker. From the seat box to where he ran to the gangway is about 7 feet. That he struck the caboose at the rate of about 4 or 5 miles, or 6 miles an hour. That he was hardly forty feet back when he put the air on. That it could not have been over forty feet from the caboose. He claims that it was dark, and the reflected light shone on the caboose. (R. 44).

That he made some measurements as to distance. That it was 1,575 feet from the west main Y to the east main Y on the passing track, the track Mr. Youngblood's train was on. That the station is nearer the east Y than the west, that there is not much difference. That it is 850 feet from the west Y to the point of the collision; from the point of the collision to the bridge is 640 feet.

That he made a test on the 2nd of May, 1909, as to what time the sun set at Fort Worth, and that it set at 7:11.

Witness then testified with reference to the rule shown him, which provided as follows: "Every engine between sunset and sunrise will have a white headlight burning, and a red light and signal box on the rear of the tender showing directly to the rear." Another, "that every passenger train should have a bell cord attached to the bell in the cab of the engine, and a red light on the rear platform of the last car between sunset and sunrise; also that all other trains will have a red flag on each side of the last car in day time, and a red light on each side, and one in the center of the last car in train at night." (R. 60).

Further he testified that the darkness and the curve prevented him from seeing this caboose between the yard

limit board and the trestle, and the darkness and the curve prevented him from seeing it at the trestle. If it had been daylight or sundown—before darkness, he could not have seen it in day time. That he did not believe he could have seen the caboose over two or three car lengths if it had been day time, in coming over the trestle. That an average car length was about 30 feet. That even in day time, looking ahead out of his engine on his side he would have to go within 60 or 75 or 90 feet of it before he could have seen it, on account of the curve. That he could not have seen the caboose 150 or 200 feet back of the yard limit board. That when he passed the bridge or trestle it was dark or dusk and his headlight was shining. That on a straight track within a limited space he could see as clearly on the track as he could in day time. If it had been straight track with nothing to obstruct his view, with the headlight shining he could have seen the caboose from the trestle. That when the fireman hollered he put the air in emergency. That he thought on that grade with an engine and caboose he could bring it to a stop within seventy-five or eighty feet running at six to eight miles an hour, which would have been a good stop. That if his attention had been called to the caboose when he was within 175 feet of it he could have put on the air and stopped the engine before it struck the caboose. (R. 44-51).

That he understood from the yard limit board that under the rules and customs when he reached that point he should have his engine and train under control, and should approach the station from that territory expecting to find a train occupying the main line at any point between the yard limit board and the station. That he understood it was the object of having his train under control so he could stop within the range of his vision if reasonably flagged. (R. 51).

That what he testified with reference to the sun setting at 7:11 on the 2nd day of May, 1909, one year after the accident, he meant there was nothing visible of the sun at that time, that it had disappeared from the horizon.

On re-direct examination he said that while he would ex-

pect to find a train standing on the main track at any time, he would expect to find red lights on the caboose or be flagged a reasonable distance if after dark. Either would have prevented the accident. (R. 51).

We have omitted his testimony with reference to certain rules and matters for the reason that the Court held same to have no application, and did not submit same to the jury.

Referring to his testimony with reference to the nature of the accident and his injuries, no question is raised on appeal as to this. The testimony of plaintiff tended to show that he did receive certain physical injuries.

A. T. Smart, witness for Prater, who was not in the service of the railway company at the time of giving his evidence, showed that he was the conductor on the train of which Prater was engineer, and testified that the accident occurred at 7:50 p. m., for the reason that he looked after his watch after he got to the ground.

When he first received warning that the accident was about to occur the train was running at between 5 and 7 miles an hour, he should judge. The first warning he had of the accident the brakeman said "look out." That he straightened up to pull the air, and put the air on, he should judge two or three rail lengths before he hit the train. That his report stated they were running three or four miles an hour at the time of the accident, which he stated was true. That he stepped on the ground and walked immediately to the pilot of the engine, which he found to be damaged. The first warning he had was when Brakeman Atkins hollered "look out, he was going to hit that fellow," he raised up to pull the air, and as I did that the brakeman put on the air. That he got out of the caboose just as quickly as he could. That if there had been red lights on the caboose they ran into the engineer and fireman should have seen them a quarter of a mile back. That he saw two red lights on a train ahead. That he did not know how far a headlight would show on the rear of a standing caboose, or the caboose which they struck. The rules provided that an engineer should have his train under control coming into stations or water tanks, by which he

understood that you must approach any point on the main line expecting to find the main line occupied by another train, or what he understood by being under control, in case you were flagged you could stop your train. That Mr. Prater had his train under control sufficiently that if there had been any warning he would not have hit him. That with his experience as a railroad man, and his observation of the rules and customs he would not have expected this train there at that time without red lights on the caboose. That they were in the yard limits. (R. 52-55).

CROSS-EXAMINATION.

He said he was riding on the right hand side of the caboose in the cupalo facing east when he reached the yard limit board. That he saw red lights on a caboose between the switches as they passed the yard limit board; that there was a train standing there with headlight burning. That he saw no part of the train which was hit until he hit it. That he would call it dark at the time, a cloudy evening, could not swear whether or not the moon was shining, could not see an object out from the track. That the train which was hit was standing around the curve; that you cannot see very far for the curve. That if he had been walking along the track and no train between him and the train struck, possibly he could have seen the bulk of something standing there, six or eight car lengths. He could not testify as to whether or not the stars were shining. A person might have seen a buggy or an object coming up a straight track there at that time. When asked as to whether or not he could see a whole train a considerable distance, he answered, "I never saw a whole train a considerable distance." Further that if he remembers right, when the collision occurred he had gotten hold of the caboose door and was opening it. That he had just dropped down on his feet and walked to the door about two steps, and had gotten hold of the door, when he felt the stop, but did not feel any jar. That he then got off on the left side and walked up ahead to the engine, but did not see the fireman on the engine. That he went to the pilot of the engine and then came back. Prater was on the side of the hill at the opposite corner of

the tank where the caboose and engine came together. That the fireman came up from the opposite side of the train. He saw him after he went to the pilot and back. That he got off the rear end of the caboose and walked up on the north side, which was the side the fireman rode on; that he did not see him anywhere between the rear and the front end of the caboose; that he showed up from the rear, he does not know where he got off. That if there had been a brakeman on the rear end of the caboose which was struck giving signals, he thinks he would have seen him looking across the curve.

He further testified that it was the purpose of the yard limit board to apprise engineers of the fact that it is necessary to regulate the speed of their train; that they were expected to find a train anywhere on the track within the yard. That if it was night, and a train was in the yard limits and had red signal lights out and stopped he would expect someone to go back and flag. That the yard limit board was placed there for you to approach expecting to find a train on the main line on coming into Thurber; going east and stopping right inside the yard limit board right around the curve you have no warning. That the yard limit board was a caution signal, in one sense, as much as a flag. It is a fact that you are not only supposed to rely upon the other fellow, but are expected to operate your train expecting to find a train there, and have your train under control, so you can stop, which was what they were doing at this time. It was a fact that if it was day time, you would expect to see a flag on the caboose, and if it was dark enough you would expect to see signal lamps.

He did not know of any rule which required him on approaching the scene of the accident to have his train under control so as to have it stop and prevent running into a train that was backing there on the track without any lights or flagman being sent back. That Mr. Ward discharged him on account of the wreck. (R. 55-58).

W. L. Stone testified at the time of the accident he was a brakeman under Smart and that on approaching Thurber he was in the cupola of the caboose and had been keeping

a lookout for lights and trains. He then described a certain train which was standing on the main line between the switches and east of the train which was run into. He stated he saw no lights on the train which was run into. That when Adkins, the rear brakeman, hollered, was when he first had his attention called to the fact that there was going to be a collision. That he looked out and saw the caboose standing possibly two car lengths away. That he looked and saw the reflection of the headlight of his train on the end of the caboose, and at the time his train was running possibly six miles an hour.

He testified that he was not in the railroad business at the time of giving his testimony, but running a saloon. (R. 37-38).

A. C. Smith testified he was firing the engine Prater was running at the time of the accident. That the first he saw was the rear end of the train he struck when he got close to it. That as he came around the curve, the headlight was naturally turned with the engine and saw it show on the caboose as soon as he came on it. He hollored "look out" and jumped off as soon as he could; he jumped off on the left hand side, the north side. That after he jumped the engine continued to run and struck the other train. That as he jumped he fell and got up and stood there, and looked until the engine struck. That his train consisted of caboose and engine. That when he got up and stood there he did not know what distance it was from the rear end of the caboose and his train, *about a car length ahead of him, maybe not so far, anyhow it was not so very far.* That a car length was about 30 feet. To the best of his recollection as he approached the point of collision, they were running at between 8, 12 and 15 miles an hour. He was shown a statement wherein he said he was running between 8 and 10 miles, and which he had heretofore made, and in which he further stated that the engine was drifting, was moving without steam. He stated the first thing that attracted his attention was the headlight shining on the caboose. That he knew he had passed the yard limit board, which was west of the trestle. He was riding on the north side of the engine, and the first thing that attracted his attention to the

standing caboose, *the one they ran into, he saw the headlight of his engine shine on it. It was not shining directly on it because of the curve, but there were enough rays of the light to show the caboose. That he hollored to the engineer and jumped off. That he turned as he got off his seat, got down to the step and jumped off.* He did not have far to go to get off the engine. He was sitting on his side of the engine and back of the cab, called the deck. All he had to do was to turn around, catch hold of the hand hold, step down and jump off. That he would have to go about as many steps to get off (pointing to the witness stand).

He did not remember what he said before as to how far the caboose was from him when he first observed it; of course he would have to say the same thing, he could not swear one thing one time and another time, and he supposed what he swore on the last trial would be more apt to be correct; he stood by that as being more correct than what he said now. *That the best of his recollection now was that when the caboose first showed up it was something like six or ten car lengths from him when he first saw it.* He did not remember, something like that, he could not say. He did not remember how far he was from the caboose. That he did not know of his own knowledge just what time the accident occurred; it was not as dark as it could be; it was on the second of May, after sundown, about dusk. (R. 25-27).

Witness was shown a statement of what he had formerly stated, that it was dusk, or quite dark, as appears on Record, page 34.

S. N. Youngblood, engineer for the T. & P., in testifying for Prater showed that he was at Thurber Junction on the night of the accident, and that he had pulled his engine and train off the passing track onto the west Y so as to clear the east Y. That it was not really dark and not really light. That he put on his headlight. That when he went to pull down to clear the east Y he thinks Varney's train was above the switch, about the cattle guard, which was west from the west Y, but not very far, 20 or 30 feet, and his recollection is there were 12 or 14 cars in Varney's train. He referred

to the report of the photograph shown him, and identified same as being a good picture.

He further testified that in coming around the curve where the collision occurred that it was a pretty sharp curve, but he could not say what degree. That in going east the engineer could not see very far directly ahead of him, and that engineers usually had firemen to look out for them after coming down to the whistle board. That he supposed one could see about two rail lengths looking ahead, that is, looking out in front; that there was a window you could sit straight up and look out, and a side window, too; the engineer in coming around curves of that kind would look out as far as he could, and make the fireman look out. The fireman is on the inside of the curve.

That Thurber Junction was 76 miles west of Fort Worth. That the town of Thurber was about four miles south of the junction. *That when a train was coming from the west and going east approaching Thurber station, when you reached the yard limit board, the engineers always put their engine under control, which was the purpose of the board, to come in under control, and not hit anybody if possible, and he would consider six miles an hour to be under control. That in his opinion in passing the yard limit board and approaching from there on to Thurber Junction he should have his train running down to six miles an hour; that they should be on the lookout or have firemen look out, as the engineer could not see very far. That it was an engineer's duty to be on the lookout for standing trains after passing the yard limit board; that it was the engineer's duty to be on the lookout all the time.* If an engineer is coming in and his headlight is burning it shines ahead of him; it shines down the track and spreads out; in some places it shines down the track and in some places it don't. It is owing to the degree of the curve. (R. 19-22).

He thought the track was about level from the trestle to the cattle guard along to where the accident occurred. Taking the grade, say at the trestle, *and coming up to the place of the accident, at six miles an hour, with an engine and a caboose, the apparatus working in good order, he*

thinks by the use of the appliances an engine and caboose could be stopped within 75 or 80 feet, but he had never made the test. Of course, it would be owing to the condition of the rails. On a dry evening, conditions would be good for a stop. That he had never made a test and had never seen a test made of that kind.

That it was not a cloudy evening, nor stormy; it was apparently an ordinary evening. (R. 23).

Further he said that approaching the point where the collision occurred, say from the trestle, that if you come from the trestle with your engine going east, with your headlight burning, that there was not a time when the light from that headlight would not shine on the rails ahead of you, but the main focus will not show on the rails; that the rays of the headlight would show on the rails but not the main focus of it. (R. 24).

Dick Weison, engineer for the railway company, and witness for the plaintiff, testified that he came on the scene after the accident occurred, and saw Prater, who was then in the caboose.

He testified with reference to seeing Prater's engine and examined it, and found the pilot mashed off, several braces mashed off and bent. That the first information he had of the wreck was that he was flagged by a brakeman, he did not remember how far back, somewhere in the neighborhood of the little bridge.

On cross-examination he said that *when you get to the yard limit board near Thurber Junction you are supposed to have your train under control so that stop could be made in a short distance. That after passing the trestle and approaching on up to the switch he usually reduced his speed to about 6 or 8 miles per hour.*

He testified with reference to the legs of the West and East Y leading off south towards Thurber, and said that it frequently happened that trains came down from the mines and back down there.

It was agreed that it was about 1,385 feet from the yard limit board to the place of the accident. (R. 30).

Aside from the question of darkness, he said a man could see a considerable distance from the yard limit board, a man on the north side of the engine could see a considerable way; he hardly thought he could see as far as the switch. *That the engineer was supposed to be on the lookout all the time as he comes into these yards and see down the track as soon as his range of vision comes into view. That he did not entirely depend on the fireman; that the engineer was on the lookout; that he depended on the fireman in this way: the fireman could see a good deal further than he could. That the engineer was supposed to be on the lookout on his seat so as to catch the first object that comes into view.*

He testified that if a train was coming in on the main line from Thurber and he was coming in from the west with a train, if it was night he would expect to find lights on the rear end of it, and if it was the front end, he would expect a headlight on the engine. He stated that the yard limit board was put there to caution engineers to put their trains under control expecting to find a train on the main line. That if it was dark he would expect some red lights to be on the rear end of the train. *That an engineer was expected to have his train under control coming in, so as to stop it, regardless of what the other fellow might or might not have on his train. That if he saw a man without lights certainly he would stop.*

That you were expected, in coming into junction points, to guard against any possible accident. (R. 32).

That Thurber was a regular stopping place for trains. That the usual rate of speed they come over this track where the accident occurred was six to eight miles an hour. That if nobody is in the way, the fireman says: "Everything clear up to the depot," and we put there. That the curve is a little up hill and you have to work steam to get up hill. (R. 32).

H. K. Farnsworth, a witness for plaintiff, and who was eating at a Chinese restaurant when the accident occurred, testified with reference to certain switches, and to giving Youngblood signals with his lantern prior to the accident.

That when he got to Thurber and went on the passing track, he does not remember the time. That it was sundown, not dark, about dusk. That he had his lantern lighted, the hind man lit it and gave it to him. That they did not wait to light the lanterns until they were actually needed. That there was a time between sundown and dark when they had to get ready for the future. That if they were at a station and going out to make another run of about eight or ten miles, say about sundown, and laying there for ten or fifteen minutes, and knew they would want lights, he would not wait until he left the station, until he actually needed them, to light them. (R. 33).

Stanley Boykin, a lawyer, five years in the Government service in the Weather Bureau, testified that on the 2nd of May, 1909, just one year after the accident, he went down to Thurber Junction and made some observation as to the time the sun set, which he made at a point a few yards west of the station platform. The atmosphere was clear, and the horizon was clear, except it seemed to be obscured by some low mountains. That he regulated his watch with the time at the station and observed the sun set at 7:14. That he meant by sunset when the center of the sun was on the horizon, to-wit, that half of the old man was down and half up. (R. 59).

In the bill of exceptions it was agreed between the parties that the original plats and maps might be sent up with the records, and looked to and considered by the Court, and also the photographs.

DEFENDANT'S TESTIMONY.

John Resche, a civil engineer, in the employ of the railway company, testified to making a plat of the premises in connection with the track west of Thurber Junction and the place where the accident occurred to Mr. Prater. Referring to that plat, he pointed out the station, and the point of collision, which is west of the station, and the trestle which is west of that, and the yard limit board, still further west. That it was 1,385 feet from the yard limit board to the point of accident, and from the point of the accident up to the head block 840 feet, and from there to the

cattle guard about 25 or 30 feet, which would make it about 810 feet from the point of the accident to the cattle guard. That the curve starts 254 feet west of the head block, and runs in an eastern direction, bearing to the north. That it was straight coming from the yard limit board down to the trestle up to a certain point, and then a curve started in bearing toward the north. That the end of the curve was 254 feet west of the head block of the Thurber Junction yards. That the curve extends from the point marked "X" to a point marked "Y," and was a 2 degree curve. Not a sharp curve, but a light curve. (R. 70-71).

John Ward, who was superintendent of this division for the railway company, testified to having charge of the movement of trains over that division, and that he had a yard limit board installed west of Thurber Junction for the purpose of preventing trains occupying the main line from having to send a flagman back to protect the rear of their trains. That engineers coming into Thurber Junction, when they reach the yard board, are supposed to have their trains under full control so that they can stop within the range of their vision if there is any obstruction on the track ahead of them. That they were also required to keep a constant lookout ahead for anything that might obstruct the main line track. He identified a certain bulletin, which read as follows:

"The Texas & Pacific Railway Company.
Office of Supt. R. G. Div.,
Big Springs, Texas, April 1st, 1903.
'Bulletin.'

"All Conductors and Engineers:

"This is to advise you that a yard limit board has been erected about fifteen hundred feet west of bridge 97, about one-half mile west of Thurber Junction.

"All trains will approach this limit with trains under full control expecting to find other trains or engines occupying the main line, but all freight trains will not be expected to occupy this limit on

the time of passenger trains without a flagman being out the required distance.

"Yours truly,
(Signed) J. W. WARD."

He also said that according to the rules and practice, tail lights should be put on a caboose at or before dark. That it was quite frequently the practice that when a train was standing at a station and they were to go beyond and not quite dark at the time, but would become dark before they reach the next station, that they put tail lights out while waiting at the staion. (R. 71-72).

J. W. Barger testified, that on the day of the accident he was rear brakeman of Nichols' train, the caboose of which was struck by the Prator engine. That he did not have any lights on the rear end of the caboose. That it was light enough that they did not have to have lights. That the first he knew that Prator's engine and caboose was approaching was when he heard it and looked and saw it; that it was away back about the curve; that he was in the caboose lighting his lamp. That he had just gotten it out of the box and was lighting it when he heard them coming and saw they did not have a train except an engine and caboose. That he picked up his lamp and stood there and they still kept coming, and he saw he was coming pretty fast, and that he then walked out to the rear platform, and as they did not seem to shut off anything he commenced to flag on the rear end of the caboose, and he saw they were not going to stop he got off and started for them, and when they struck he was a car length in the rear of his caboose. (R. 73-74).

J. Y. Burke, Roadmaster, testified to having made a test at the point of accident with an engine and caboose to ascertain how soon an engine could be stopped. That four tests were made. The first two tests were made at about the same rate of speed, which was eight and a half miles an hour, and on each one of these tests we stopped at 53 feet. He made another test at 18 7-10 miles an hour and stop was made within 283 feet. Another at 11.9 miles per hour and stop was made within 72 feet. These tests were made with an engine and caboose. (R. 77-78).

B. H. Stewart, an employe, testified to having his attention called to the accident on the night it occurred, at which time he was at the depot, and went down to the place. That at the time he went down from the depot it was between sundown and dark. He would not have considered it dark, and carried no light with him. That when he left the depot he saw something was wrong with the train, that it was light enough to see that there was something wrong down there, and he went on down to the place. That he supposed it was 700 or 800 feet or maybe 1,000 feet from the depot to the place of the accident. (R. 78-79).

J. F. Mann, Foreman, testified that he was at home at Thurber Junction, which was about 2,000 feet from the accident, when he received the information concerning it. He went down and found the engine driven into the back end of the caboose. *That the headlight of the engine was broken; that when the engine struck the caboose it drove the trucks right through under the car, broke the sills half way up the caboose, and the sides of the caboose stuck back on the sides of the engine. The pilot was set about half way up under the caboose, and the sides of the caboose stuck up on each side of the engine. That the timbers in the caboose were new, strong timbers, practically new. Assuming that the caboose and the train to which it was attached was standing, and the engine and another caboose were approaching it from the west, and struck it, from the condition and appearance in his opinion it could not possibly have been running at a less speed than 20 miles an hour. When he got away from home it was about twilight. He approached the scene of the accident from the south, walking in a northerly direction, and he could see an object as big as a box car or caboose pretty nearly as far as he could see it at any time. It was a little after sundown. It was not night and it was not broad daylight. You could see a string of cars or a man walking away off; he would say he could see a man walking 1,500 feet.* (R. 78-80).

Andrews, (R. 81) witness for defendant, testified he was a brakeman and at Thurber at the night of the accident, and was at the road crossing about even with the depot when his attention was called to the fact of the accident.

That he left about ten minutes after that on his train going east. That he noticed the degree of light and darkness at the time, that it was just between sundown and dark, but not dark; that when he coupled up this crossing about the time he was told about the wreck you could see the length of the side track all right; that on a straight track with the natural eye he knew he could see thirty car lengths; where he was he could see thirty car lengths. That after his train pulled out of Thurber he had a clear vision and could observe some objects. That he got up about middle ways of the train and rode up about 25 or 30 cars beyond the coal chutes at Thurber, and walked back to the caboose, and Engineer Robinson was in the caboose dead heading, and they got to talking about it; as a result of that conversation he made some observations. That he looked back towards the coal chute, and he observed the coal chute, and they were then thirty or forty car lengths from it. That he was on a moving train, and the coal chute was stationary, and it was twenty feet high. That he was carrying a lighted lantern, and did not remember whether he was carrying it at the time of the wreck or not.

Verney, witness for defendant, testified that on the day of the accident he was engineer of the train the caboose of which was run into by Prater; he, Prater, having followed his train in. That on reaching Thurber Junction he stopped his train at the point where it was struck, or in the neighborhood of a car length of it, which would be about 60 feet west of the cattleguard, west of the switch. He thinks he had fourteen cars in his train. The caboose was on the rear end. The reason for stopping at that point near the cattleguard was that there was a train ahead of him going in the same direction. Going in on the main line there was a train headed in the opposite direction on what is known as the passing track. After he got in there to the proper place the cars he was pulling would be stopped to unload merchandise from the platform of the depot. That his train reached Thurber and stopped at that point at 7:32 or 7:33, and after it was stopped, it was not moved until struck. When he reached Thurber he stopped, and the first thing he did was to look around his engine to see if there were any de-

fects in sight to repair there at Thurber. He found the connection with the main pin was a little warmer than it need be, and he screwed the grease cup down. Then he got a magazine out of his seat box and read for a while; that he sat down on the ties on the south side of the track next to the tank. That when the accident occurred he had just gotten on the engine a moment previous and was on the right hand side. That he did not know how long it was before his train was run into; that he was reading the magazine, possibly two, three or four minutes. That the first thing attracting his attention to the fact of the collision was the shock to his own engine. That he had just given up reading at the time of the collision because it was no longer convenient to read with the light he had. That it was too dark to see a considerable distance. He remembered the station house was quite visible about the time of the accident; that was about 30 car lengths away. The collision occurred at 7:45, he remembered taking out his watch immediately after the collision and it was then 7:46. He then went down to the scene of the accident. He did not know how long it was after he felt the shock of the engine. When he got there Prater was lying on the ground on the north side of the embankment close to the caboose. He remembered he could see Prater, but not very distinctly; that he could see a box car at that time; that he could see an engine; that he saw the engine there at the caboose when he got off his engine. That the headlight was not burning on Prater's engine when he got there. When he got back to where Prater was it was quite dusk; it was not as dark as it got later on. He distinguished Prater on the ground; if he had been a stranger he would probably not have known him. That there was a yard limit board west of the trestle. That there was a rule in force at that time that on reaching the yard limit we must have our engine under control, which I understood meant to be able to stop in time to avoid striking any obstacles, that is, to stop on the track if anything was in sight. (R. 68-69).

Brooks Baker, witness for defendant, testified that he was a County Surveyor of Tarrant County, and on the 2nd of May, 1909 (same being just one year after the accident)

he went out to Thurber Junction with attorneys for defendant, and some other men, to make certain measurements and observations connected with the scene of the accident. That at about 7 o'clock in the evening he started from Thurber station and walked west, passing the scene of the accident and continued west across the trestle and stood near the trestle until sundown. That the sun went down behind a hill west of the point in controversy, which was covered with timber, and as near as he could judge the sun set at 7:18 or 7:20. That he was requested to make accurate observations connected with the setting of the sun, and the degree of light, which he noted in a book. *About 7:40 after the sun went down he was able to read from a copy of the Dallas News. It was a clear night, and the moon was in view, but at that time the light of the moon did not effect the shades or anything of that nature.* (R. 75).

That an engine brought a caboose down and left it at the point of the accident, and then the engine backed down to where he and the other parties were standing; that the engine was headed east, and was west of the caboose left standing at what was pointed out as the point of the accident. That he got into the engine between 7:45 and 7:50 and made observations. That at 7:50 the caboose was plainly visible, people could be seen walking around clear up to the cattle guard. That he stood in the engine between the cab and the tender, and looked through the little window on the engineer's side, along the side of the boiler, and also looked out from the north side, and also occupied the engineer's side and looked both through this litttle window in the cab, and leaned out to the side. That the headlight of the engine was not lighted at the time, 7:50. That with the engine standing on the trestle, and he on the engineer's side of the engine, or on the engineer's seat looking out through the window in front, he could see the end of the caboose standing at the place of the accident, and could see people around there. That both a party for the defendant, and a party for the plaintiff were there making observations, and there was quite a crowd around. He could see men walking around the caboose, and see telephone poles, and could see

the cattle guards, and people walking around the cattle guards. At that time, 7:50, the moon had nothing to do with his ability to see objects.

That he counted the rails from the trestle, the point where he made his observations. There were twenty-one rails, thirty feet long, 630 feet. That he was at the time he was making the observations 600 feet and over from the caboose. That the headlight of the engine was not lighted. That there were no tail lights, no lights of any kind on the caboose at that time. That after making the observations at 7:50 with the engine at the trestle, the engine was moved up to a point within 250 feet of the caboose. That it was still visible during the moving of it up to the point within 250 feet of the caboose. That it was visible at all times from the north side of the cab, and from the engineer's side, and the closer he got the better view he had of it. That it was not visible at all times from the engineer's side looking out of the front window, but by leaning outside of the window it was. At the point 250 feet from the caboose it was entirely visible and clear by looking through the front window from the engineer's side.

After making observations at 250 feet away, the engine was backed down west to a point somewhere about the bridge and the headlight was turned on. The reflection naturally turned to the right and the engine approached the caboose again with the light on. That they came within 375 feet of the caboose and the engine was stopped. That the caboose showed very plainly at that distance. While the main focus of the headlight was to the south of the caboose, the north side of the caboose was also light. The light shone considerably to the north of it.

That at the point 375 feet west of the caboose with the headlight turned on, it shone on the caboose very plainly, on both sides. That he could see the little grooves in the panels of the wood, that he could see the knob on the door. The lookout on top of the tower was entirely visible, and perfectly plain. That he could see people standing around on the ground. This was nearly eight o'clock. That objects were entirely visible by means of the headlight.. They got

out of the engine and walked to the caboose, and it was then eight o'clock. (R. 60-64).

T. B. Boyd, living in Fort Worth, testified to going out to Thurber Junction on the 2nd of May, 1909, and being with Brooks Baker and the other parties, and going down on the trestle west of the accident to make some observations, and observing the sun go down which he says, set at 7:18 or 7:20. That at about 7:40 he got up into the cab of the engine to make observations. That at 7:40 he remembers the degree of light was sufficient that Brooks Baker could read from a copy of the Dallas News handed him, and that he observed himself that it was light enough to read. That there was a moon that night, but at that time the moon did not make any light.

He then testified to the fact of the headlight being turned on and running up to within 375 feet of the standing caboose when it could be seen from the headlight shining on the caboose very plainly and that at the time he made a memoranda of his observations. (R. 63-64).

O. W. Head, who was a member of the party, testified substantially as to the same observation, except he did not recall the exact distance the engine was standing from the caboose at the place it stopped with the headlight on, but testified to the fact that the headlight shown on the caboose and same was plainly visible. (R. 66).

Stanley Boykin was recalled by Prater, and testified with reference to the movement of the caboose and of the engine, and the position of the caboose at the time the tests were made on May 2nd, 1909. He said that after the headlight was turned on the engine came up rather close, to the caboose, within 100 or 150 feet, and when the headlight was turned on it shone very brightly against the end of the caboose. At the time the engine was close to the caboose, and when the bright part of the headlight struck the caboose the engine was within 100 or 150 feet. Mr. Thompson stepped it, but he, the witness, had forgotten exactly how much it was. That at the time the engine came around the curve with the headlight on, the main part of the headlight shone off south on some trees and

people out there sitting near the right of way fence, that the side of the light struck the caboose, shining off this way (indicating); and of course as it got closer more and more light got on the caboose. The headlight was turned on about 7:38, and it was just a few minutes before that they backed the engine up close to the caboose. (R. 88).

On cross-examination he said he watched the engine from the time it left the caboose at the scene of the accident, and went down to the bridge. Standing at the caboose he could see the engine there at the bridge, he could tell it was something there; that it was 7:38 when the engine backed up, came up close to the caboose, and started back down towards the bridge. The engine first came up towards the caboose, and then turned on the headlight, and the next time it came up the headlight was on. The first time it came up it stopped within about 150 feet of the caboose, he should say. The headlight was then turned on. That it is his recollection that they stepped the distance between these points, "it might have been counted by rails, and it might have been 12 rail lengths. Twelve rail lengths would be 360 feet; it might have been that; it might have been a block away. After it came up close and the headlight was turned on it backed down to the bridge. Then the engine came up to the caboose with the headlight on. My recollection is that the headlight was not turned on at the bridge. I did not make a notation of that." That he did not think the headlight was turned on down at the trestle, and then it was moved up to this point, 12 rail lengths from the caboose with the headlight on. The reason he remembered the headlight was turned on near the caboose was because he saw a man come around with a lantern, and he knew at that time it was near the caboose, he would say within 300 feet of it. He did not think it was turned on prior to that time down on the trestle. That there was a slight curve. That when the headlight was first turned on it shone pretty fairly on the back end of the caboose; then it came up and shone quite plainly. (R. 89).

That he felt pretty sure the headlight was not turned on until it got up to that point, close to the engine. That he saw a crowd get off the engine, the last time. There was

quite a crowd got off and came on up; there was quite a crowd around the caboose. The headlight shone full on the end of the caboose when they turned it on before they backed down to the bridge. He stated it was first turned on within about 100 or 150 feet of the caboose, that it might have been a little further away, that it was not very far, perhaps as far back as a block away, that he did not make any measurements of the distance.

He also testified that when the engine came up close to the caboose he noticed a man lean out of the cab window, that he saw the man lean out as far as he could on the right side of the engine.

It is agreed that the original plats, marked M and B, and the blueprint identified by the witness Resche marked T, and the original photographs identified by the witness Lefler, shall be filed with the record, and sent up by the Clerk, and considered by the Court of appeal.

The Court by its charge to the jury submitted to the jury the issue as to whether the defendant railway company was negligent in failing to have lights on the rear end of the caboose, which Prater ran into, and gave instructions, that if the railway company was so negligent, and the same was the proximate cause of the collision, to find for the plaintiff, unless they found that he was guilty of negligence in the operation of his engine.

The Court further instructed the jury that if it was found from the evidence that the plaintiff after passing the yard limit board at Thurber Junction failed to have his engine under control, and if they found he was guilty of negligence in such failure, and that same directly caused and contributed to the accident; or if they found that Prater after reaching the yard limit board did not put his engine under control; or if they found that he did have the engine under control, and with such engine under control he could have seen the caboose in time to stop his engine before striking same, in the exercise of reasonable care, then to find for the defendant.

The Court did not submit to the jury any issue as to

whether the defendant company was negligent with reference to the failure to send a flagman back, or put torpedoes on the track, holding same was not required under the rules of the company.

The Court also refused to instruct the jury to find for defendant. (R. 95).

ARGUMENT.

May it please the Honorable Court:

It will be observed, according to the issues submitted to the jury by the Court, Prater was allowed to recover upon the theory that the defendant railway company was negligent with reference to its failure to have a signal light on the rear end of the caboose with which his engine collided, and that he himself was not guilty of contributory negligence.

As will be observed by the assignments presented, all errors, if any there be, are waived, save and except the issue as to whether or not Prater was guilty of contributory negligence, and further, whether or not the evidence upon this point was of such a nature that the Court should have instructed a verdict for the defendant, or in its failure to do so, have granted a new trial, upon the ground substantially that as a matter of law the undisputed facts were such as to establish contributory negligence on the part of the said Prater.

In discussing the facts connected with this case, we of course, recognize the general principle that where there is an issue of fact to go to the jury, the Court having submitted such issue, and the verdict of the jury has been approved by the trial court, that it is not within the province of the Court to disturb the action of the lower court. This being ordinarily true, yet at the same time there frequently arise cases when it is the duty of the trial judge to withdraw the issues from the jury, by peremptory instructions, and for failure to do so, this Court should reverse.

As was very forcibly expressed in the language of Mr. Justice Brewer in the case of Patton vs. the Ry. Co., 179

U. S. 658: "That there are times when it is proper for the Court to direct a verdict is clear. It is well settled that the Court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the Court in the exercise of sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling upon the admissibility of testimony, but one, who in our jurisprudence stands charged with full responsibility."

Judge Pardee in Ry. Co. vs. Burke, 60 F. R. 74, says: "Where under the law, the duty of the trial judge is to direct a verdict, this Court in reviewing the case properly shown by the record should meet the full measure of his responsibility, and * * * in such case, it is not sufficient to fall back on the trial judge's opinion as conclusive that reasonable men may differ as to the effect of the undisputed evidence in the case." This view was approved by this Court in the case of T. & P. Ry. Co. vs. Eason, 92 F. R. 563.

In the cases of Railway Company vs. Thomas, 60 F. R. 379, and Railway Company vs. Eason, 92 F. R. 259, the Court has had occasion to very thoroughly discuss and review the authority bearing upon the question as to whether, and under what circumstances, it is within the province and duty of the trial court to withdraw the issues from the jury by peremptory instructions.

In the case of the Union Pacific Railway Company vs. McDonald (152 U. S. 283), this Court used the following language:

> "Looking at all the facts, there was an entire absence of any just ground for imputing contributory negligence to the plaintiff. If the jury had so found, the Court could properly have set aside the verdict as being against the evidence. Upon the question of negligence, the case is within the rule that the Court may withdraw a case from the jury, altogether, and 'direct a verdict for the

> plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the Court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.' Delaware, Lackawana, etc., Railroad vs. Converse, 139 U. S. 469, 472, and authorities there cited; Elliott vs. Chicago, Milwaukee & St. Paul Ry. Co., 160 U. S. 245; Anderson County Commissioners vs. Beal, 113 U. S. 227, 241."

See also the case of Southern Pacific Ry. Co. vs. Poole, 160 U. S. 438.

The above review of the authorities shows that the difficulty does not lie in determining the legal principles but rather in determining whether or not a given state of facts demands the application of a rule so clearly established.

In the present case we propose to give full weight to the testimony of Prater and his witnesses, governed by the proper construction thereof, and it is our contention that from such testimony, taken in connection with the undisputed testimony introduced by the railway company, and further, in connection with certain physical facts shown about which there is no room for controversy, that as a matter of law only one just conclusion can be drawn, to-wit:

> Prater was negligent either in running his engine at such a rate of speed as that it was not under control as is admitted it should have been, or, that it was not under such control as permitted him to stop same within a distance when he could have seen the caboose and avoided the accident, or that he was not keeping a proper lookout as he should have been doing and did not observe the standing caboose as soon as he could have observed same, in view of all the surrounding circumstances.

Either one of which, or all, being true, justifies the conclusion that as a matter of law he was guilty of contrib-

utory negligence and on said account the Court should not have submitted such issue to the jury, but should have given an instruction in favor of the defendant.

In order to determine this proposition, the leading and material issue is: What were the duties and obligations of Prater going into Thurber Junction upon reaching what is termed the yard board limit? As to this duty there is no dispute and we will rely upon the testimony of Prater himself and that of his witnesses introduced. We have quoted this fully in the statement of facts in our brief, but will briefly recapitulate the substantial parts thereof.

Dick Weisen, an engineer, introduced as a witness for Prater, testified in his behalf that when *an engineer got to the yard limit board at Thurber Junction he was supposed to have his train under control so that a stop could be made in a short distance, and that after passing the trestle and approaching the switch he usually reduced his speed to about six to eight miles per hour.* (Brief, page ....).

It was agreed that it was about 1,385 feet from the yard limit board to the place of the accident.

Weisen further testified: *That an engineer was supposed to be on the lookout all the time as he comes into the yards and see down the track as soon as his range of vision comes into view. That the engineer was supposed to be on the lookout on his side so as to catch the first object that comes in view. That the engineer was supposed to have his train under control coming in so as to stop it regardless of what the other fellow might or might not have on his train.* Further, *that the engineer was expected in coming into junction points to guard against any possible accident, and that the usual rate of speed coming in over the track where the accident occurred was six to eight miles per hour.* (Brief, page ....).

Youngblood, an engineer, and witness for Prater, testified: *That when a train was coming in from the west and going east approaching Thurber Junction, when it reached the yard limit board the engineers put their engines under control, which was the purpose of the board to come in*

under control and not hurt anybody, if possible, and that he would consider six miles an hour to be under control. That in his opinion in passing the yard limit board and approaching from the west to Thurber Junction, he should have his train running down to six miles per hour; that it was the engineer's duty to be on the lookout for standing cars after passing the yard limit board; that taking the grade at the trestle, and coming to the place of the accident at six miles per hour, with the engine and caboose working in good order, he was of the opinion that by the use of the appliances it could be stopped within 75 or 80 feet. He further testified that *on approaching the point where the accident occurred from the trestle, that if you come from the trestle with your engine going east, with the headlight burning, there was not a time when the light from the headlight would not shine on the rails of the track, but that the main focus of the light would not show on the rails but that the rays from the headlight would show on the rails.* The trestle is shown to have been 630 feet from the place of accident.

Smart, a witness introduced by Prater and who was conductor on the train Prater was pulling as engineer, testified that *the yard limit board was placed there so that persons approaching would expect to find a train on the main line coming into Thurber; that the yard limit board was a caution signal in one sense, as much as a flag; that it was a fact that one is not only supposed to rely upon the other fellow (meaning evidently some one else to have out red lights) but you were expected to operate your train expecting to find another train there, and to have your train under control so you could stop.* (Brief, page ....).

Smith, who was introduced as a witness for plaintiff, and who was fireman on the engine on which Prater was engineer, gave it as his recollection that *as they approached the point of collision the train was running between eight, twelve and fifteen miles per hour, and the first thing that attracted his attention was the headlight shining on the caboose; that he was riding on the north side of the engine, and the first thing that attracted his attention to the standing caboose, the one with which they collided, he saw the*

headlight of his engine shone on it. It was not shining directly on it, but there was enough rays of the light to show the caboose. That he hollered to the engineer and jumped off; that he turned as he got off his seat, got down to the step and jumped off. He could not remember what he said at a former trial as to how far away the caboose was when he first observed it, but to the best of his recollection at that time it was something like six or ten car lengths from him when he first saw it, and that he did not remember how far he was from the caboose. (Brief, page ....).

A car length is shown to have been at least 30 feet.

Prater testified that *with his engine and caboose he could bring it to a stop within 75 to 80 feet running at six to eight miles an hour. That if his attention had been called to the caboose when he was within 175 feet of it he could have put on the air and stopped the engine before it struck the caboose. That he understood that the object of having his train under control was so he could stop it within the range of his vision if reasonably flagged.* (Brief, page ....).

It will be thus observed from this undisputed testimony, and from the plaintiff and his witnesses, that the yard limit board was put in to serve a very important and useful purpose. It meant to all engineers that upon reaching same and from that point on approaching the station the engine should be under control and the engineer should so operate his engine as if expecting to find a train standing on the main line track at any point, and to have same so under control that he could stop it within the line of his vision—that is to say, that if he was not able to see more than 200 feet in front of him, he should operate his engine so as to stop in less than 200 feet, and if he could not see over 75 feet in front of him, his speed should be such that he could stop within 75 feet, etc.

And further, it is conclusively established admitting that while the train standing on the main line should have a red light on the rear end of same, yet that did not waive the duty of the engineer to have his train under control, and that he must not rely on the fact that this duty would be performed, but that he was expected to provide against the

negligence of anybody who might omit this duty, and expect to find a train standing there without a light. In other words, the company had taken double caution, to-wit: that if it was dark a rear light should be on the standing train, and also upon reaching the yard limit board the speed should be reduced so that an engineer could bring his train to a stop at any distance when an object might appear within the line of his vision. In other words, if the curve, or any other thing, was such that he could not see over 75 feet in front of him, or 100 or 150 feet, he should not run at a speed which would prevent him from stopping his engine within the line of his vision. This evidently was a safe rule, and guarded against accidents on account of failure of parties to have rear lights on standing trains.

The accident occurred on the evening of the second day of May, 1908, between 7:40 and 7:50 o'clock. It is practically admitted that the sun descended from view somewhere between 7:15 and 7:20 p. m. From the evidence it was a question of controversy as to whether or not a sufficient amount of darkness had come on to require a rear light, but we will assume from the verdict that there was. If this is true, then Prater was obligated to be on the lookout and determine how far ahead he could see with his naked eye and have his train at such speed as would enable him to stop within his range of vision. Any other rule would be insufficient and would be liable to cause accidents, and from this it follows, as stated, that if the darkness, or the curve, was such that with his naked eye he could only see as much as 100 or 150 feet in front of him, he should have his engine running at such rate of speed as that he could stop within 100 or 150 feet.

If, then, it be conceded that Prater, on account of the darkness and the curve, could not have seen the standing caboose at a distance of over 50, 75 or 100 feet, or whatever he could have seen it, his engine should have been running at such a rate of speed as that he could have stopped within such range of his vision.

In addition to the testimony shown by witnesses for the plaintiff, we now call attention to the testimony introduced

by the railway company, which we think, in view of all the surrounding circumstances, could not be controverted, and should be accepted as facts. We have already quoted fully the same, but will again give the substance thereof.

Brooks Baker, County Surveyor of Tarrant County, Texas, and a disinterested person, showed that he went on the scene of this accident just a year to the day later, and that the sun went down about 7:18 or 7:20, and that at 7:40, which is practically the time of the accident in question, he was able to read a copy of the Dallas News without the aid of a light.

Coming now to the physical test, he testified that while at the trestle, 630 feet from the scene of the accident, a person in the cab of the engine could see a caboose standing at the place of the accident with no tail light on it, plainly, and that people could be seen walking around clear up to the cattle guard. That he looked through the window on the engineer's side, and also on the north side, and also leaned out. That on looking through the window on the engineer's side he could see the caboose in front and the people around it. That the engine was then moved up to a point within 250 feet of the caboose and that the caboose was plainly visible while moving from the trestle 630 feet away, up to this point; that while going from the trestle up to this point the caboose was not visible all the way by looking through the front window, but by leaning out it was, and at the point 250 feet from the accident it was entirely clear by looking through the front window from the engineer's side.

Suppose we say, however, that there was a difference in atmospheric conditions on the night of the accident and the time he made these observations at the same hour just a year later, his testimony as to physical facts with the headlight on clearly establishes our contention. He states that the engine was then backed to the trestle (which was 630 feet away from the place of the accident) and the headlight turned on, and the engine then moved up to a point within 375 feet of the place of the accident, and at this point the main focus of the light on the engine was to

the south of the caboose, but that the light from the engine also shown on the north side of the caboose, and that at this point, 375 feet away with the headlight turned on, one could see the caboose plainly, and that the light shone on the caboose very plainly on both sides, and that he could see the little grooves in the panels of the wood, and he could see the knob on the door; that the lookout on top of the tower was entirely visible and perfectly plain. (Brief, page ....).

The testimony of T. B. Boyd and O. W. Head was substantially the same.

These are physical facts, established by actual tests and the only ones so made, and evidence which should not be disregarded, so that if we admit Prater's contention that it was too dark to see very far with the naked eye, and he admitting that his headlight was on, there is no excuse, whatever, why he could not have seen the standing caboose at least 375 feet away, had he been on the lookout. We are not able to say whether or not he saw it at that time, but if he did not he was derelict in his duty in not being on the lookout, and if he did see it within the 375 feet and endeavored to stop at that time, then his fault was in having his engine running too fast so that he could not stop, and this conclusion would justify the opinion of Smith, the fireman, that they were running something like fifteen miles per hour. It will be recalled that Smith also testified that his recollection was that he saw the caboose by the light of the engine when he was some six, eight or ten car lengths away.

The only evidence which in any way tends to affect these physical facts, is that of Mr. Stanley Boykin, a young attorney, who was present at the time these tests were made, in the interest of Prater, and whose testimony has been quoted. Giving this young man the full benefit of the honesty of his intentions, yet it is unfortunate that he did not make notations at the time, as was done by the other witnesses. A close analysis of his testimony, however, will show that while he admits he was mistaken as to some points of distance, yet it sustains very fully the testimony

of the witnesses who made the actual tests and observations. We quote substantially his testimony upon this point:

Referring to the tests made on the second of May, 1909, and a year later and at a time when the head-light on the approaching engine making the tests was turned on, he says: *When the head-light was turned on it shone very brightly against the end of the caboose; at that time the engine was close to the caboose; that when the bright part of the head-light struck the caboose the engine was within 100 to 150 feet of it. Mr. Thompson stepped it, but that he had forgotten exactly how much it was. That as the engine came around the curve with the head-light on, the main part of the light shone off to the south; that the side of the light struck the caboose, shining off in the manner indicated, but of course as they got closer more and more of the light got on the caboose.*

On cross-examination he said that *when the head-light was turned on he would say that the engine was within 150 feet of the caboose, and that it was his recollection that they stepped the distance between these points; that it might have been counted by rails and that it might have been twelve rail lengths. Twelve rail lengths would be about 360 feet and that it might have been that; that it might have been a block away.* Further he says: *The reason he remembered was because he saw a man coming around with a lantern and that he knew at that time it was near the caboose; that he would say it was within 300 feet. That when the head-light was first turned on it shone pretty fairly on the back end of the caboose.* (Brief, page .....). Further he says: *That the light was first turned on about 100 or 150 feet from the caboose, but it might have been a little farther away. It was not very far—it is possible that it might have been as far as a block away; that he did not make any memorandum or measurement of the distance.* (Brief, page .....). Further he says: *That when he observed the engine that was making the test coming up towards the caboose he noticed a man leaning out of the cab window and saw the man lean out as far as he could on the right side of the engine.* (Brief, page .....).

J. F. Mann, who examined the scene of the accident, tes-

tified that when he got there that the engine which had struck the caboose and had driven the trucks right through under the end of the car, broke the sills half way up the caboose, and the sides of the caboose stuck back on the sides of the engine. The pilot was set about half way up under the caboose, and the sides of the caboose stuck up on each side of the engine. That the timbers in the caboose were new, strong timbers, practically new, and that the sills were comparatively new. That the caboose was driven into the car ahead of it.

From the circumstances and taking into consideration the character of the damages done, Mann gave it as his opinion that the engine when it struck the standing caboose could not possibly have been running at a less rate of speed than twenty miles per hour. No witness controverts Mann with reference to the manner of the damages done.

Smith, the fireman, and a witness for Prater, testified that when he saw the standing caboose he jumped off, and went down to the edge or bottom of the dump, and he gave it as his recollection that when the collision occurred he was at the bottom of the dump and that he was about even with the caboose attached to the train being pulled by Prater.

Now, if the headlight of this engine was sufficient to shine on the rear end of the caboose, as much as 300 feet away, and if Prater, by looking through the window, could have seen that, which is shown to be true beyond a doubt, the question arises, why did his engine strike the caboose? If he was going, as he claims, at the rate of eight miles per hour, he had ample opportunity to have stopped his train, because he admits he could have stopped it within seventy-five or eighty feet, when in truth and fact he had as much as 300 feet or more, and giving full weight to the recollection of Mr. Boykin, even if it were 150 feet away, he still had ample opportunity at the rate of eight miles per hour, to have checked his engine.

The inquiry naturally arises, under this state of facts, why it was that Prater did not see this caboose until his engine was within thirty or forty feet of it, as claimed by

him. It was his duty to be on the lookout, and it was not for him to rely upon any supposed duty on the part of any other person to have a rear light on the caboose. He was not supposed to depend upon some other person discharging his duty, when in the clear and explicit words of the rule, he should operate his engine, and be on the lookout, expecting to find a train on this track at any point, and at any time.

His claim that he was operating the train at the rate of eight miles an hour is wholly untenable, because the physical facts establish beyond a controversy, as it seems to us, the conclusion, had he been going at that rate of speed, from the time he received the warning of the fact that a caboose was standing in front of him, his engine could have been stopped readily. Eight miles per hour is about eleven feet per second. Prater says he put the air on immediately when his fireman gave him the warning that the caboose was there. The fireman left his side of the cab, walked back to the point between the cab and the tank, jumped off, fell down, got up again, and saw Prater's train passing him, and when the collision occurred was west of the rear end of this caboose.

Another point to be considered, which completely destroys Prater's contention that the train was only running eight miles per hour, and that he only saw the caboose some thirty feet away from the head of his engine, is the physical fact that he could have stopped within fifty or sixty feet by application of air, and yet, we find that his engine struck the caboose with such violent force as to damage the caboose very materially, which would have been impossible had the speed been reduced from eight miles down, after the air had been put on, in running a distance of thirty or forty feet.

The truth of the matter is, that Prater was going at a rapid rate of speed, and when within at least three hundred feet, which was a point from which he could clearly see the caboose, and at the point at which he evidently did put on his air, his speed was so great that he could not check the train.

When we consider the statement of Smith that he was eight or ten car lengths away, when we show that at a distance of 360 feet away, the end of the caboose was plainly visible, as shown by actual experiment, and when we take into consideration the time consumed by the conductor in getting down from the cupola, and being at the door at the time the accident occurred, it is evident that at a distance of something like 300 or more feet away, Prater discovered the caboose, and had he been going at eight miles an hour, he could have stopped, as he admits, and avoided the accident.

The whole matter is summed up in a nutshell by the admission of Prater that at eight miles per hour, had he seen the caboose within a distance of 150 feet, the accident would not have occurred. We have endeavored to quote fully the testimony bearing upon these issues.

Prater was charged with a grave and responsible position. Rules for his protection, and the lives of his fellow laborers, and of the public, had been duly enacted, and put into effect. There rested upon him the strict injunction when reaching the yard limit board to approach the station with his engine under complete control, expecting to find a train at any point between the said limit board and the station.

As is very aptly stated in a somewhat similar case, Railway Company vs. Scanlon, 60 S. W., 644:

> "The very nature of their business obviously requires that these employes, in the discharge of their respective duties, must themselves feel under some obligation to the public they serve. Not only their own lives, but those of their fellows, and large moneyed interests, represented by rolling stock and freight, all call for the exercise by the trainmen of a high degree of caution, as well as a strict observance of those rules found by experience to best conserve their own safety, and that of their charges. The responsible trainman who violates such seasonable rules, of which he has knowledge, and which he has undertaken to

regard, must need take upon himself the personal consequences of his dereliction. If injury results to him by reason of such violation, and which would not, in any probability have occurred, but for it, he alone should suffer the consequences of his fault."

In the light of the facts to contend that a man operating an engine at a speed of eight miles per hour, with a full electric headlight burning, can run within forty feet of a standing caboose before it was yet fully dark, without discovering same, calls for a draft on credulity beyond the realms of common sense and reason, and to compensate such a man for injuries so recklessly self-inflicted, is but to put a premium on recklessness, and reward the acts of an unfaithful and negligent employe.

What are the real facts? Both he and Smith saw the caboose by the electric headlight from the engine, at or before the point where all of the witnesses who made any effort to have an actual observation, to-wit, not less than three hundred and sixty feet away, or the eight or ten car lengths named by Smith. At this time, Prater was running his engine at so great a rate of speed that he could not check it in time to avoid the accident.

Whichever way you view it he was negligent; if going at eight miles per hour, he should have seen it, and stopped; if he was going at a greater rate than eight miles per hour, he was negligent with reference to the speed of the train, as self-confessed.

It will be noted also that the witnesses speak of having his train so running under control as to stop within the line of his vision. In other words, he should be on the lookout, and see how far the headlight of his engine shone upon the track, and be ready to stop within the distance that he could actually see ahead of him.

The facts are before the Court. The amount involved is not great, but the principle is important. Every person, whether riding in an emigrant car, or on a sleeper, or working as an employe, has a vital interest in this decision.

For the reasons presented, we insist this Court should hold as a matter of law, that the trial Court should have instructed the jury to find for the defendant below, and for its failure to do so, judgment should be reversed, and here rendered for the railway company.

Respectfully submitted,

W. L. HALL,
Attorney for Texas & Pacific Ry. Co.,
Plaintiff in Error.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 211

THE TEXAS & PACIFIC RAILWAY CO., PLAINTIFF IN ERROR,

VS.

C. C. PRATER, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT
Of Defendant in Error.
C. C. PRATER

By C. C. Prater in Pro. Per.

Defendant in Error Prator, conceives that there is but one issue presented by plaintiff in error for review by the Court, in different forms os assignment, viz.: Was Prator guilty of such contributory negligence in the manner in which he approached the point of collision, as to preclude him, as a matter of law, from recovering in the case.

The plaintiff in error, hereinafter called "the Railway Company," takes the affirmative of the proposition and the defendant in error, hereinafter called "Prator," denies the proposition assumed by the railway company, and in order that we may get his views of the case properly before the Court, we will state our position in the form of propositions, and then set out such parts of the record, as we think sustains the negative of the propositions, as above stated.

FIRST.

The evidence was sufficient to show and to authorize the jury in finding that Prator approached the place of collision with his train under control, as a matter of fact, and as that term was used in the printed rules pleaded by and offered in evidence by the railway company.

SECOND.

The evidence was sufficient to show and to authorize the jury in finding that Prator in approaching the place of collision with his engine, kept, and had his fireman, Smith, to keep a proper lookout for obstructions which may have been on the track in front of his engine, and that the obstruction was not discovered in time to prevent the collision and resulting injury to Prator, through negligence of the employes of the railway company in failing to put lights on the rear of the train collided with, and through no negligence on the part of Prator.

THIRD.

The most that can be said in the case, as we understand it, is that there was a conflict of evidence, as to whether or not Prator had his engine under control, and as to whether or not he kept a proper lookout, or used proper care to have his fireman to keep a proper lookout, and the jury having decided the conflict in favor of Prator, this Court, under the rules of law, governing its decisions will not disturb the verdict.

STATEMENTS FROM THE RECORD.

Prator pleaded, among other things, not necessary to state, that the railway company was guilty of negligence in not having proper lights placed on the rear of the train, it being stopped on the main track, away from any regular stopping place, and it being dark, and that by reason of the fact that proper lights had not been placed on the caboose, or rear car of said train, that he

failed to discover same, on the track, in time to prevent the collision of his engine with same. (R. 10).

The railway compaiy pleaded contributory negligence upon the part of Prator, alleging that he failed to keep a proper lookout for obstructions on the track, and failed to have his train under control, while approaching the point of collision, setting forth certain rules it had promulgated for the guidance of its employes in such cases. (R. 13).

While other acts of neglicence upon the part of the railway company was alleged in Prator's petition, the Court submitted the matter to the jury on the issue or issues alone, as to whether or not the railway company was guilty of negligence in failing to have lights on the rear of the train, and as to whether or not Prator had his train under control, and as to whether or not he kept a proper lookout for obstructions on the track in approaching the point of collision, informing the jury that if it found against him on either of these issues, that its verdict must be against him, even though it found the railway company was also guilty of negligence. (R. 89, *et seq*).

There is no complaint of the charge of the Court, and the undisputed evidence showed that the train operated by Prator collided with a train operated by one Verney, which had been stopped by him on the main track of the railway away from any regular stopping place, and that no lights had been placed on the rear car or caboose of said train; that the caboose was not lighted, and that Prator was seriously injured in such collision. As to whether or not it was dark at the time and place of collision, or rather as to the degree of darkness, there was a conflict of evidence, and we will only set out in this brief such of the evidence as justified the jury in finding that it was dark enough to make it negligence in the railway company to fail to put such lights upon the said train; while the railway company does not deny negli-

gence on its part with reference to the matter at issue, we set out this evidence as throwing light upon the question as to whether or not Prator failed to use proper care to discover obstructions on the track at the time of the collision. And as the evidence on this issue is intimately blended with the evidence as to whether or not Prator had his train under control in approaching the place of collision, we will set same all together, and also the evidence showing the general condition or situation of the track at that point with all surroundings calculated to throw any light upon the points at issue.

S. A. Youngblood, witness for Prator, testified that he was in the service of the railway company as engineer, and that he had his engine and train on the passing track as shown on the plat in evidence at and before the time of the collision, he had his train lights on his train, and when he heard that Prator was injured, he hit his torch to go down to where he was. (Other evidence and plat showed distance). As to state of darkness, immediately before the collision, as shown by other evidence and circumstances, he said, "When I pulled my engine down off of the passing track on to the west "Y" to clear the track at the ast "Y" it as not real dark, and it was not real light, it was dark enough that I had lit light, headlight, to pull down, I think I turned it on about the time we went to couple up, so in pulling down I could see what we were doing (R. 19-20). The witness had testified that he had brought his train in on the house track in the yards at Thurber, stopped same and cut his train on a public crossing, then he was ordered to couple up, and pull down west so as to clear an east "Y," and after doing this he heard of the collision (R. 20). He explained from a plat which is before the Court, as a part of the record. He further said that a train standing on the main track between the east and west "Y's" and ahead of the train collided with, had its train lights out at and before the time he heard of the collision. (R. 20), bottom of page).

As to curve in track where collision occurred and custom of engineers and firemen going around same, the witness testified: "Coming around that curve where the collision is said to have occurred, and where we found Mr. Prator, it curves to the right—curves to the left coming east. It is a pretty sharp curve; coming in this way, it curves that way (indicating). I don't know the degree of curve it is. I have been going up and down the road there for about eighteen years, over the same track, every few days, every week, or such as that. On coming east, the engineer can't see very far directly ahead of his engine. We have the fireman look out for us after coming down to the whistle-board; we usually have the fireman lookout. I suppose you can see about two rail-lengths looking out, that is, if you look out in front, looking at the rails. There is a window you can sit right straight up and look out, and there is a side window, too, the engineer in coming around curves of that kind would look out as far as he could, and make the fireman look out, the fireman is on the inside of the curve. (R. 21).

All the evidence showed that the place of the engineer was on the right-hand side of the engine and the fireman on the left.

The witness examined the caboose collided with and described the injuries as being slight, with no derailment. (R. 21).

As to what having the engine "under control" meant, this witness testified: "The signal-board out west of the trestle (see same on plats in evidence) means for you to have your engine under control, so if there is any obstruction on the main line, or anything, not to hit anything. When a train is coming from the west, going east, approaching Thurber Junction Station, when we reach this yard limit board, we always put the engine under control, that is the purpose of the board, to come in under control, and not hit anybody, if possible. I would consider that six miles an hour would be under

control. It is my opinion that in passing that yard limit board, and in approaching from there on to Thurber Junction, you should have your train running down to six miles an hour." (R. 23). The witness then goes on to further explain how the engineer and fireman should both keep a lookout, saying that the fireman being on the inside of the curse could see farther than the engineer, he being on the outside. (R. 23). The witness testified as to the blue print offered in evidence by the railway company: "It seems to me that this is too straight. Of course, I am not familiar with blue print, this show the curve, this curve is not true, there is a curve there, but i do not know the degree." (R. 22). That was on cross-examination. In redirect examination he testified: "This looks straighter to me than the curve on the ground; I don't know the degree of the curve, but this looks 'kinder' straight." (R. 24).

This witness also testified as to the headlight in coming around this curve, that the rays of the headlight would shine ahead on the rails, but not the main focus, describing how the headlight would cast the main focus ahead of the engine and turn on to the track as the engine rounded the curve. (R. 24, and other pages).

TESTIMONY OF A. C. SMITH.

A. C. Smith, fireman on Prator's engine, testified as to immediate facts attending collision: "It was about dusk when we got to Thurber—at the time of the accident—I don't know that I can express it any plainer than that; most anybody knows what I mean by that; it was not dark as it could be, and not as light as it could be. Our train was lighted up; no the headlight was not put out; it was still burning. I can't say whether the rear lights were burning or not. * * * * Just before the accident I was sitting on my seat in the engine on the left hand side." (Here witness was shown a plat, now before the Court) and using plat testified: "Here is the west "Y" indicating); this is the point of the collision; back here

is the little bridge. I was on this side of the engine—left hand side—I was sitting there most of the time when I was not putting in a fire. Just before the collision, I was looking out, looking ahead, watching for anything that might be on the track. When we got in sight of Thurber Junction, I saw this train (another train shown on the plat ahead of the train collided with) with lights up near the depot. I did not see anything on the track ahead of us until we were right close to it. We collided with another train, a caboose. I saw no lights on the caboose of that train. If it had any lights on it I did not notice them. I didn't see any. If there had been any lights on it, I suppose that I would have seen them." (Here the attorney for the railway company admitted that there were no lights on the rear end of the caboose). The witness: "The first thing I saw was the rear end of the train we struck; when we got right close up to it. I saw it, as we came around the cruve; our headlight would naturally turn with the engine and I saw it shine on the caboose, as soon as we came on it. I hollowed, 'Lookout, we are going to hit something,' and jumped off. I jumped off on the left-hand side. I jumped off as soon as I could; after I jumped off, the engine continued to run and struck the other train; when I jumped off I fell, I moved as I fell, and when I stopped, I got up and stood there and looked until it struck. Our train consisted of only a caboose and an engine. When I gut up and stood there, I don't know just what distance I was from the rear end of our caboose, when it struck. The caboose was possibly a car length ahead of me; maybe not so far; anyway it was not very far. The end of the caboose was not a great ways ahead of me when it stopped; I don't remember the exact distance. A car length is thirty odd feet; I believe a caboose is about the same. An engine and the tender and appliances is longer than a car; I don't know just how long it is. Before the collision we were approaching Thurber and I was on the lookout; when we came around here (indicating) I said I saw a

lighted train; they were up further east than the train we struck. This train standing ahead of the train we struck was on the main line, the same as the train we struck. I saw his tail lights, also a fellow on the passing track; he was headed west; I saw his headlight burning; I saw them looking across the curse this way (indicating). I don't know how far I could have seen the train we hit before we hit it if there had been rear lights on it; I believe I could have seen it before I saw those others. I would not undertake to say how far back west I could have seen it, because I don't know; I don't think I could even approximate it. * * * I judge I could have seen the caboose we struck one hundred yards, if it had had rear lights on it. (R. 25).

As to speed of train witness testified: "To the best of my recollection, we were running as we approached the point of collision, between eight and twelve or fifteen miles an hour, something like that. Yes, I made a signed statement in this case. I remember the speed now as well as I ever did; I think I can come as close to the speed as I ever did. (Witness is shown statement heretofore made). It says here eight to ten miles an hour; the engine was drifting; I mean by drifting that the engine was moving without the use of steam—the steam had been shut off. (R. 26).

Note.—It is not deemed necessary to set out the cross-examination of the witness in this brief. Wherever it may have conflicted with his direct examination, the jury had the right to believe that he told the truth on his direct examination). On his re-direct examination, he got back this way on the question of darkness:

Mr. Bowlin: With reference to whether it was light or dark, I will ask you to look at that (hands witness paper).

A. That is my statement; I dictated this statement* *

Q. What do you say now, having seen this statement,

as to the condition of the light or darkness at the time of the collision?

A. I say the same thing, because I think the word means practically the same thing, "quite dark"; I say now it was about dusk; I think that would mean the same thing as "quite dark," or "dusk." Sometimes I would use the words "quite dark" instead of "dusk," probably. Sometimes in speaking of the light if it be dusk, I might say it was "quite dark." When I say "quite dark," I mean about dusk. That is what I meant, quite dark or dusk. (R. 28).

Dick Weisen, a witness for Prator, testified on the points in issue, after having stated that he had been a locomotive engineer for the railway company for about eighteen years, and that he came up behind Prator's train with his engine and train immediately after the collision. "I just went to the caboose and saw Mr. Prator, and he asked me to look at his engine and see how badly damaged it was; I examined Mr. Prator's engine; the pilot was smashed off—several braces mashed and bent; I did not notice any particular thing, I just looked at the engine with a view of finding out whether she could handle herself or not; I didn't notice the headlight; I didn't climb up to see how it was; I looked at the trucks and wheels. I think the oil pipe was broke, but there was nothing to keep the engine from moving itself; the headlight was out—it was not burning; I don't know whether it was damaged or not, I didn't examine the headlight." (R. 37).

As to the train being under control, "I know where the yard-board is; the yard-board is just west of that little bridge—west of the place of the accident; the yard limit board was put there to caution the men coming in there to run slow and not to expect to be flagged. When you approach Thurber Junction—when you get to that yard limit board you are supposed to have your train under control, so you can stop in a short distance, if you see the

main line blocked or obstructed by anything; you are liable to find somebody there at any time. After you pass over the trestle and approach on up to the switch, I usually reduce my speed to about six or eight miles an hour (R. 31). The usual rate of speed we come over this track where the accident occurred is six to eight to ten miles an hour; if there is nobody in the way the fireman says everything is clear up to the depot, we pull up there; we can't run fast, because if you slow down around the curve, it is a little uphill, and you have to work steam to get up hill. (R. 32).

As to his expecting to find lights on a train if stopped on the main track, after dark, he said: "I was asked about cars running in here on the main track from Thurber; if a train was to come in on this main track from Thurber, and I was coming in from the west with a train, if it was in the night time, I would expect to find lights on the rear end of it, and if it was the front end, I would expect to find a headlight on the engine. I stated that the yard limit board was put there to caution us to put our trains under control, expecting to find a train on the main line; if it was dark I would expect some red lights to be on the rear of the train. (R. 32).

H. K. Fawnsworth, a witness for Prator, testified that he was in the yards at Thurber Junction, when the collision occurred, working as brakeman for the railway company. He was with Youngblood's train. His evidence shows that before the accident and at the time of same, he was using a lighted lantern making signals; that other employes of the company were using their lighted lanterns and that they gave light that could be seen about over the yards. (R. 34). As to the state of the darkness, he said: "I went down and opened the switch so we could get on the main line if he wanted to go. It was then about good dusk, I guess. I mean by "good dusk," I could see an object about a block away; that is, the size of a house. If I had the skylight on it I

guess I could. (R. 34).

Note.—While this witness did not see the accident, but heard of it a short time after he had thrown the switch, the circumstances show that the collision occurred after he threw the switch. See his evidence (R. 34, 35), on this point.

W. L. Stone, for Prator, testified, after stating that he was a brakeman on Prator's train: "In approaching Thurber on that occasion, I was in the cupola of the caboose; Mr. Smart, the conductor, and another brakeman, named Adkins, were in there with me. At the time of the collision it was dark; I had been keeping a lookout for lights and trains. There was a train standing on the main line in between the switches here (indicating) and with the caboose just clear of the 'Y' with the tail lights lighted; they were burning when we approached this curve around here; this train was standing here that we struck (indicating); I saw no lights on it of any kind. Mr. Adkins, the rear brakeman, 'hollered," is what first attracted my ottention to the fact that there was going to be a collision; I then looked out and saw the caboose standing possibly two car lengths from me and I got in behind, so if anything should happen to fly, it would not hit me. Mr. Adkins said 'look out, we are into them!' Mr. Adkins was on the inside of the curve; he just looked this way (indicating) and saw the reflection of our headlight on the end of this caboose, and he said 'look out, we are into them.' When I looked I saw the reflection of our headlight on the caboose. When we first discovered the caboose, we were running possibly six miles an hour, but the air went on just about the time that Adkins 'hollered,' just about the time he 'hollered' the air went on in emergency. I should say when Mr. Adkins 'hollered' that the engine was about two and a half or three car lengths from the caboose.

"I stated that we lit out train lights about seventeen miles before we got to Thurber. It was getting dusk

then. I don't think the train was going at a rate of speed exceeding eighteen or twenty miles an hour before we got inside the yard limits. I remember stopping at the water tank; that was at Strawn tank, about four miles from Thurber; we had lights to stop the caboose at the tank in order to fill our water barrel; we all had lanterns at that point. (R. 37).

"The accident occurred between 7:52 and 7:55. When we went out the front end of the caboose, Mr. Smart and I, I asked Mr. Smart what time it was, and if I am not mistaken, his watch was 7:55 and mine 7:52; that was just after the collision; I jumped down out of the cupola and says: 'Well, it didn't do much damage," just like that, to Mr. Smart, and he made the remark that it was 7:52 or 7:55; I looked at my watch and to the best of my recollection it was 7:52 by my watch. That was just after the accident—just as we went out of the caboose." (R. 37, 38). "If there had been lights on the rear end of this caboose that we ran into, we could have seen it about the mile board, probably on this side of the mile board." (R. 40). A plat in evidence shows the board mentioned and distance from place of collision.

We here set forth the evidence of Prator immediately bearing upon the issues heretofore stated:

"My name is C. C. Prator; I am the plaintiff in this case. I was 45 years old the 29th of last June. My occupation is that of a locomotive engineer; have followed that occupation for twenty-three or twenty-four years. The first trip I made on the Texas & Pacific was on the second day of February, 1906. I was injured on the Texas & Pacific on the night of the second day of May, 1908, near Thurber Junction—west of Thurber Junction, I guess, something like half a mile. (R. 49). My engine was a 162-ton engine. It is about fifteen feet from the bottom to the top of the boiler—that is from the ground: the dome of the boiler sits on the top of the boiler; I don't know exactly the diameter of the done; but it covers

pretty nearly the full space of the top of the boiler. The boiler is thirty-three feet long from the head to the front end of the boiler. From my seat in the cab—from where my feet was to the top of the boiler is six feet, six inches; there is a running board that extends from the cab along the side of the boiler; it extends back into the cab and makes the floor of the cab; I sit with my feet on it; from the top of that running-board to the top of the boiler is six feet six inches. My height is somewhat over five feet, I don't know how many inches; the sand-box on the engine sits in front of the dome—I guess five or six feet in front of the dome; it is pretty near the size of the dome

On the evening of the accident as we approached Thurber, it was getting about dusk, as we passed through Strawn; it was a little too dark to come through Strawn without my headlight burning; I turned it on the other side; I had a short carbon to my headlight and I was trying to get to the tank to keep from turning on my headlight, so I could put in a new carbon, and it was too dark to come through Strawn without a headlight, and I turned on the headlight until I got through Strawn, and then shut my headlight down so it would cool off so I could put in a new carbon while the fireman was taking water, and turn my headlight on again. Strawn is four and four-tenths miles the other side of Thurber Junction. The water tank about 7:38 1-2; it was 7:38 when the fireman water tank is about a mile this side of Strawn. I left the got through taking water; I looked at my watch just before he threw up the spout; then I slacked ahead for them to fill the water barrel, and they took water in the barrel in the caboose. I put a new carbon in the headlight while the fireman was taking water; it was then so dark you couldn't see without a light any distance at all. (R. 40).

(Witness is shown a plat representing the yards at Thurber Junction).

In approaching the point of collision, I remember

reaching the yard limit board; I reduced the speed of my engine there, down to between six and eight miles an hour; I understand from the rule requiring that trains be under control that the train must be running, when you come into a station or yard, so you can stop on a danger signal in a reasonable distance; that is what I understand; it is not to stop, but merely to reduce the speed of your train. As I approached the place of the accident my engine was drifting—that is, the steam was shut off, and you come in around this curve there where it is under the hill, like that: you roll down that and then roll up—up about the switch; the grade gets stiff up there—about the west "Y"; with an engine and caboose it will roll up along about that switch; heavy trains will roll further than the switch. You have got to work steam if the train gets against this, if you let it get down too slow. In appreaching that place I kept a lookout as far as I could, looking ahead; I was lying out of the cab window all the time until I passed over the bridge there; just as I passed over the bridge—that is my whistling place for the station, I dropped back on my seat and looked straight across at the fireman and watched to see him—see if he was looking straight ahead, and then I reached up to get the whistle cord to whistle for the station, and just as I did that he says, "look out, hold her," or something of that kind. I turned the whistle cord loose and jammed the air in emergency and threw my head to the right, and just as I did I could see the right corner of the caboose; I turned and threw my legs around to the side of the box to slide off; it was something unusual to see a train out there without red lights or any flag, and I presumed some cars had got away and were drifting back on me; the first I see, I see a brakeman run out of the caboose door and I saw the caboose rolling, and I didn't wait any longer; I ran to the left to get off; just as I got hold of the handhold and went to drop from the first deck to the second deck, they struck. That is a two-foot drop from the first deck to the second deck, and as

my feet struck the second deck the engine struck the caboose. I fell and my back struck the iron steps, and as I went down, it threw me out from the engine and I rolled kind of the way we were going down to the bottom of the dump. I don't think the head of my train could have been more than forty feet from the caboose when the fireman gave the alarm; I don't think it was over thirty or thirty-five feet between my engine and this caboose when I first saw it; I just could see the right corner of the caboose when the brakeman ran out; it was then I think about a twenty-foot space between the engine and the caboose, when he ran out of the caboose door. (R. 41).

(Witness is here shown photographs of the surroundings at the scene of the accident, and makes explanation concerning same).

"In coming around this curve at the scene of the accident, my position is on the right side of the engine and the fireman's on the left; I could not have seen the caboose we ran into over the boiler from my position in the cab coming around that curve. The reason I couldn't have seen it was the boiler was over my head, if I was standing up. There are two winodws to the cab; there is a front window and a side window—sliding window. I use the front window ordinarily in keeping a lookout. If it had been daylight I could have saw (seen) this caboose we ran into on that curve not over two car lengths, if that; I would have had to lean out of the cab window on the side, over this way (indicating) to have saw (seen) it. At night under the conditions the weather was then and the darkness, I think I saw the caboose just as far as it could have been seen. I had my head right over against the cab when I put the air on, and I just could see the right corner of the caboose. The reflection from the headlight caused me to see it when I did. The main rays of the headlight were shining to the right across the right of way; it was not on the track; that would flicker on the caboose; the headlight is stationary

on the engine and does not follow the curve around. The boiler is on trucks just as the front wheels of a wagon, and when we came to a curve the boiler points straight ahead and the wheels of the trucks follow the curve. When I saw the brakeman run out of the caboose door I saw the caboose roll. That indicated to me that the caboose was drifting back on me, and I always will believe it was; I would not swear positively it was, because I didn't stay there long enough; I didn't wait to investigate to see if the car was standing still or moving; I thought my life was in danger; I thought it was a cut of cars drifting back. (R. 42).

I don't remember how long I stayed there on the ground; I noticed the state of the weather; it was cloudy —looked to me to be thick cloudy; when I was lying on my back I was looking straight up; I had noticed that it was cloudy before I ever reached Thurber; it looked "threatening rain. * * * * There is a window directly in front of the engineer and one to the side; the engineer can keep a lookout and usually keeps a lookout through the front window, but in rounding curves he looks out of the side window as far as he can—sometimes he uses the side window, not often. (R. 42).

I know about where the yard limit board is just east of Thurber; the east and west yard limit boards are something over a mile apart. At the point of the accident there is no other track there except the main line track; there is a hill on each side of the track and heavy timber. The track is rather under a hill there. (R. 43).

In coming on this curve where I was injured, west of me—at my back, west, between me and sunset, is what I call the Canyon Mountains; it is down grade; you drift from the top of the canyon; it would roll up to Thurber; I drifted down hill. (R. 43).

There is a considerable mountain on the right side of the track and a considerable hill on the left; I don't know

whether these hills on the right would be considered a part of the canyon or not. You are coming through the hills all the time: it is about a mile back to where you come through this cut and drop down into this low cove place, and after you pass into the yard limits, you roll down to that culvert; then you roll right on up to the switch.

In approaching the place of the accident I didn't see any flagman or signal. (R. 44).

CROSS-EXAMINATION.

There are hills along to the right and to the left and heavy, big timber; I called the elevation along there hills; I don't know how far back you can see these hills; I said it was about sixteen miles back to where I started down the canyon. In approaching the yard limit board from the west up to the point of the accident, I spoke of timber being on either side of the railroad; some of it is scrubby timber, some of it is low; some of it stands up on that hill and is pretty high; I can't say how high it is from the yard limit board extending down across that trestle and on up to the point of the accident—I can't average the height, some of it is standing on the edge of the hill; I don't know how high the timber is along in two or three hundred feet of the railroad track. This photograph marked No. 5, which shows the engine coming around the curve somewhere near where the accident occurred, represents the timber on the south side there; it indicates the height of it as compared to other objects. That timber is cleared quite a ways back from the track. Here is another view representing the scene from the trestle west of the accident; it also shows the character of the timber on both sides. It shows the track is lower and as it crosses the trestle it is up on a dump or fill. The track there is up a fill; that would make the road that much higher above the general level of the ground on either side. (R. 44).

"I passed into the yard limits at between six and eight miles an hour; before reaching the yard limit board I checked the speed at about six or eight miles an hour; I went along at that rate of speed until the accident occurred. I was looking ahead all the time after I passed the yard limit board until I passed over this little bridge there; that is about my whistling place for the station; I dropped back in my seat and looked straight across at the fireman to see if he was looking ahead; then I reached up to pull the whistle cord; I had my head out of the window all the time until I dropped inside to do what I told you. When I dropped inside I didn't look down through the front cab window, I looked straight across at the fireman; I certainly did have to look up to catch hold of the whistle cord; I looked at the fireman first when I dropped in, I don't know how many seconds it took; I had the headlight burning on my engine; that didn't throw the light ahead of the engine on that curve, it throws it to the right of the track—certainly it throws it ahead of the engine, but not on the track on that curve; if the track is perfectly straight it throws the light down the track.

"As soon as the fireman 'hollered,' I put the air on and then got down just as soon as I could; that is all I did with reference to stopping the train. When I threw the air on that clamps the brakes on. (R. 46).

Q. How far do you say that you were from the caboose when the fireman "hollered," and you looked?

A. When I looked?

Q. Yes.

A. Between thirty and thirty-five feet from where I could see the right corner of the caboose.

Q. How far does the engine extend in front of you?
A. From me?
Q. How far does the engine extend i nfront of you?
A. I said it looked to be about thirty or thirty-five

feet between the engine and the caboose; that is what I meant; not from me, from the front end of my engine. When the brakeman ran out of the caboose door the caboose rolled; I saw the brakeman come out; I didn't see him have any light; if he had had a light I would have seen it; I saw him by the reflection of my headlight. I saw him run out. When the fireman 'hollered' "look out," I looked through the front window of the cab and saw the corner of the caboose as I came 'round facing east. I saw the brakeman come out of the door; the caboose seemed to be moving; I then turned back the other way and ran and climbed down to the point I have described —the way I told you. I was already turned this way (indicating) when I saw him run out of the door. When he ran out of the door of the caboose I ran to the north side; I was sitting on the south side—up in the cab; I was sitting right back behind the boiler; the seat box sits just a little back of the boiler head; the boiler head is in front of me—about opposite, rather. I jumped from my seat across to the left and ran across to the north side to get off. I didn't get on the south side, because I could get across there quicker. From the seat box to where I ran to the gangway is about seven feet. I struck the caboose at the rate of about four or five miles, or six miles, an hour—maybe five miles an hour. I was hardly forty feet back when I put the air on; it couldn't have been over forty feet from the caboose. I claim it was dark and the reflection—the reflected light shone on the caboose. The brakes on my engine were in fairly good working order. (R. 47).

REDIRECT EXAMINATION.

(Witness is shown document). This is the time table containing the rules. There was no other rule—general rule of custom, from the printed rules—none that I know anything about, after we got inside the yard limits. The place where the accident occurred was not a regular stopping place for trains. The regular stopping place would

have been up at the station, between the switches.

I made some measurements of the distance there. It is 1,575 feet from the west main "Y" to the east main "Y," on the passing track, on the track Mr. Youngblood's train was on. The station is nearer the east "Y" than the west, I think—there is not much difference. It is 850 feet from the west "Y" to the point of collision; from the point of collision to the bridge, or trestle, is 640 feet. I made a test on the second day of May, 1909, as to what time the sun set; when I made the test I was up in the Elk's Building, in the fourth story, here in Fort Worth; it was a clear evening. I went to Mr. Mitchell's, where all the railroad men get their watches tested and got railroad time. The sun set on May 2, 1909, in the old Board of Trade, Elk's Building, here in Fort Worth, on the fourth floor, at 7:11. (R. 47).

In these rules under the head of "Train Signals," in the third column on the same page as this other rule referred to, it says: "Every engine running between sunset and sunrise will have a white headlight burning, and a red light in signal box on the rear of tender, the light showing directly to the rear only." That was the rule in force at that time with reference to the lights on the engine. (R. 48).

"2. Every passenger train will have a bell cord attached to the bell in the cab of engine, passing through entire train and secured to the rear end of the last car; and they will have red light on rear platform of last car between sunset and sunrise. All other trains will have red flag on each side of the last car, in day time and a red light on each side and one in the center of last car in train at night." (R. 48).

I came on and when I got to the yard board limit approaching Thurber Junction, I put my train under control. I looked out from my side to see if the track was clear down to the depot. I did not continue to look that

way all the time until accident; after I had crossed the bridge I did not. From the yard board limit down to the bridge I looked continuously ahead; I was lying out of the side window, looking as far as I could; after I crossed the bridge was the first time I took my vision away from looking out ahead of me. I can't say just what space of time I had my vision away; I turned and looked across at the fireman, but that didn't take but a short space of time. I don't know just how long; my reaching up to pull the whistle cord didn't take but a very short time; I had reached up and caught hold of it—I had raised up off the seat; immediately looked ahead and discovered the corner of the caboose, and I was in thirty or thirty-five feet of it—I suppose, maybe, forty feet, when the fireman "hollered." I put the air on first and then threw my head over to one side—when the fireman "hollored," I jammed the air on full—that is all I could do; then I threw my head to one side and saw the corner of the caboose. The darkness and the curve prevented me from seeing this caboose between the yard limit board and the trestle—the darkness and the curve both prevented me from seeing it at the trestle. If it had been daylight or sundown—before darkness, I could not have seen the caboose from the trestle looking out from my cab. I could not have seen it in the daytime; I don't believe I could have seen that standing caboose over two or three car lengths if it had been daytime in coming over that trestle up there. An average cab length is about thirty feet; that would be sixty to ninety feet for the engine, somewhere along there, sixty-five to seventy feet. (R. 49). Even in the day time looking ahead out of my engine there on my side I would have had to go in sixty or seventy-five or ninety feet of it before I could have seen it, on account of the curve. I could not have seen it back one hundred and fifty or two hundred feet, back at the yard limit board. When I passed the bridge, or trestle, it was dark, or dusk. My headlight was shining; the purpose of that headlight is to throw a light ahead of me

so I could see. On a straight track within a limited space, you can see as clearly at night as you can in day time, with your headlight shining. If it had been a straight track and nothing to obstruct my view, I could have seen that caboose from the trestle up to that caboose; I could see the caboose as soon as the headlight went on it. The headlight might have shone on the caboose and be over around this long boiler and I could not have seen it. From the time I came in view of it in daylight on the same track with my headlight shining on it, I would also come into view of it in the dark.

I stated that I had my train running at six or eight miles an hour when the fireman "hollered." I put the air on in emergency. I think on that grade with an engine and caboose I could bring it to a stop within seventy-five or eighty feet, running at six to eight miles an hour; that would have been a good stop; if my attention had been called to the standing caboose when we were one hundred and twenty-five feet from it, running at the rate of speed I was, I could have put on the air and stopped the engine before we struck the caboose. Certainly I could have stopped the engine if my attention had been called to the standing caboose when it was one hundred and fifty or two hundred feet away before it struck the caboose. (R. 50).

The length of my engine and tender is about firty-five or fifty feet; the tank is about twenty-three feet. I don't remember that I testified on the last trial that the tank was thirty-three feet, I think that is the boiler and engine; (R. 50). I think the boiler from the boiler-head where I sat to the front end is thirty-three feet, and the tank is twenty-two or twenty-three feet. That would make about fifty-five feet for the total length, from the rear end of the ender to the front end of the boiler: that would not include the cow-catcher.

I said this caboose was not standing at a regular stopping place! I meant by "regular stopping place," the

depot; no, it was not a common thing and frequent occurrence for trains to stop back there where this caboose was." (R. 51).

"I stated that I would expect to find a train standing on the main track at at any time, but I would expect to find red lights on the caboose, or be flagged a reasonable distance. Either would have prevented the accident." (R. 51).

It was admitted by both parties that he sun set at the same time on the same date in 1908 and 1909, and that there had been no change in standard time.

After Ward, for the railway company, had testified to having issued the bulletin on April 1, 1903, on page 72, of the record, Prator in rebuttal testified: (Witness is shown bulletin testified to by witness, J. W. Ward, as having been issued regarding the yard limit board at Thurber Junction).

"I never saw this bulletin testified to by Mr. Ward until yesterday. I began working for the Texas & Pacific Railway Company in 1906; I never knew anything of this until yesterday. I had no other rules except those contained in the time table under which I operated." (R. 88).

A. T. Smart, conductor of the train, testified for Prator : "My name is A. T. Smart; I reside now, in Chickasha, Oklahoma. In May, 1908, I lived in Fort Worth, Texas; I was engaged in running a train on the Texas & Pacific Railway and braking; I was conductor on the extra list—braking and running extra; during the panic they pulled off a few of the crews and that put me back on the extra list.

"I went to railroading in 1886, as I remember it—about eighteen or nineteen years ago. The most of my railroad work was for the Rock Island. I was running a train as conductor when Mr. Prator ran into a caboose.

* * * The accident occurred at 7:50. (R. 52). I know that because I looked at my watch immediately after I hit the ground; we have got to tell the time when an accident happens on the road; we have to make reports of accidents, and I always practice that—after I got out on the ground the first thing I did was to look at my watch, before I even discovered where Prator was; at that time it was dark. We put out our lights coming down the canyon between thirteen and fourteen miles back from Thurber. We came in under control—between seven and eight miles an hour, when we came by the mile board.

"When I first received warning that an accident was about to occur we were running between five and seven miles an hour, I should judge. We were drifting along—I mean by that, not working steam. He had used his air coming in to get the engine under control; he slowed down and kicked his brakes off, and it was down hill and would pick up again, of course; the first warning I had of an accident the brakeman said, 'look out, he is going into that fellow.' I straightened up to pull the air, but he put on his air, I judge two or three rails length before he hit the train, and my report shows we were running three or four miles an hour; that is what I said in my report at the time of the accident; that is what I said at the time, and what I want to say now, positively. I don't think the engine moved any at all after it hit the caboose; I think it stopped still, right in a foot or so. After I stepped on the ground—I heard the splinters flying—I stepped on the ground and walked immediately to the pilot of the engine; when I turned back and heard Mr. Prator making this noise, and I don't think the engine moved at all. I made careful inspection of the accident after we cared for Mr. Prator. The pilot was torn from the engine—mashed down; the braces between the pilot—the slats in the pilot were all broken loose from the iron plate it was fastened on; there were three or

four braces broken. The headlight was still burning. The caboose was off center; the back end of the caboose was torn in; I mean by the caboose being off center, the hind pair of trucks was off center: the steps were knocked off the caboose; the front end of the platform was drove into the box car in front of it, and the box car—one pair of trucks was off center—the right hand pair of trucks on the box car. There were no trucks off the rails—no derailment. The warning I had that there was to be a collision was when Brakeman Adkins 'hollered' 'Look out, he is going to hit that fellow,' or "he is going into that fellow.' I raised up to pull the air, and asIdid that he slapped on the air. I got out of the caboose, and got out quick—just as quick as I could. (R. 53). There were no lights on the caboose we ran into. There was no flagman out to warn approaching trains. If there had been red lights on the rear end of the caboose we struck, the engineer and fireman ought to have seen them a quarter of a mile back. I had been looking forward before I got this warning—looking towards Thurber. I saw two red lights on a train ahead of this train we hit; that train was inside the switches, standing up above the switch where we head in on the "Y." (Witness refers to plat). This (indicating) represents the west "Y." The train I saw the red lights on would be standing here (indicating). I don't know how far back I saw those red lights. I saw them quite a ways back; we had been talking about what we would do when we got t oThurber; we saw a train on the passing track and a train on the main line; we saw a train on the passing track with its headlight burning, facing west; the train we ran into was between the train I saw and my train; the train we ran into had not lights on it; ust before the collision occurred, there was a stop signal given on th enorth side of the train: when I started out of the cupalo I saw a stop signal—somebody gave a stop signal with a white light; it was on this side of the train (indicating). I couldn't tell whether it was opposite the engine or ahead of the engine; I couldn't tell

whether it was on that sidetrack or not, it was on this side of the engine (indicating). I don't know where that stop signal was given—I don't know whether it was given with reference to the train we ran into or not. I didn't think much about that signal—didn't ask any questions. I remember seeing this signal very distinctly. A stop signal is to take a lantern—an ordinary white lantern—clear glass, and turn facing the person and swing it crosswise. (R. 54).

I had seen so sign of this train we ran into at all before I got the warning. (R. 54).

The headlight of Mr. Prator's engine at this point would have shown straight across there (indicating); you understand we were on a curve; the headlight, of course, would go straight across—would not follow around the curve; I don't know how far the headlight would show on the rear end of that caboose; I didn't think much about that. I don't think you could see very far; I don't think the headlight helped you see that standing train in the dark with no lights on it. (R. 67). After I got out of the cab I walked down to the pilot of the engine and saw the damage and turned and came back; when I got out of the cabocse I heard Mr. Prator and I came right back to where he was. (R. 54).

The rules provide that the engineer shall have his train under 'control' in coming into stations or water tanks. I understand by having an engine under "control" means that you must approach any point on the main line expecting to find the main line occupied by another train, or, what I might understand by being "under control" in case you are flagged, you can stop your train. If you come into a station or water tank and find a train taking water you come prepared to stop, in case he does not get out of the way so you will not run into him. "Control" means you can stop your train. Mr. Prator had his train under control sufficiently so if there had been any warning we would not have hit him. (R. 55).

In my experience as a railroad man and working for the Texas & Pacific Railway Company, and my observation of the rules and customs of the company, I would not have expected this train there at that time without red lights on the caboose. I would hate to stop my train around and let them hit me if I was in the yard limits, and they would hit me if I was in the yardlimits, and they would not say anything to me; it has been my experience that a flag protects my train—that a flagman protects my train; I sent a flagman back that night. I don't know how far out of Thurber this board is that they call the yard limit board. We were in the yard limits. (R. 55).

It is a part of my duty as conductor to regulate the speed of the train; the speed of the train was regulated speed of the train; my duty to see that the engineer does not run too fast. The speed of the train was regulated to my satisfaction. I was riding on the right side of the caboose in the cupalo when we reached the yard limit board, facing east—the same direction as the train was going; I saw red lights on a caboose between the switches as we passed the yard limit board, when we came in sight of Thurber; there was a train standing there with the headlight burning, there on the passing track; my vision was clear enough to see this. There was a train on the main line between the switches; I knew it was between the switches; I am familiar enough with the track at that point to know that, and besides the train was standing there when I went up to the engine. There was an intermediate train between the switches; I saw no part of the train we hit until we hit it. I called it dark at that time—it was cloudy—it was a cloudy evening; it was dark in the timber; I don't remember seeing any stars; I can't swear whether the moon was shining or not; at that time it was dark; when we came through Strawn it was quite dark; it was about 7:30 or 7:35 when we left Strawn; it is about a mile from Strawn down to the

water tank. I call it dusk while we were at the water tank. I could see an object out from the track: it was not pitch dark when we reached the water tank, it was getting dark; yes, it was pitch dark when we struck the caboose. It was dark—in between the timber—and cloudy, and really made it appear darker than it was. (R. 56).

I don't know of any rule or custom of the railway company at that time, or prior to that time, by which I was required, in approaching the scene of the accident, to have my train under control, so as to have time to stop and prevent running into a train that was backing back there on the track without any lights or a flagman being sent back. (R. 58).

Stanley Boykin testified for Prator that he observed the time of sunset at Thurber Junction on May 2nd, 1909, regulating his watch by the railway time at that point, and that it set at 7:14 p. m. (R. 59).

It was admitted that the bulletin testified to by Ward, as having been issued in April, 1903, was not printed in the rules published by the railway company, but that the proof of same rested on the evidence of Ward and Prator. (R. —89).

Rules offered in evidence by Prator was as follows: "Every engine between sunset and sunrise will have a white headlight burning and a red light in signal box on rear tender, the light showing directly to the rear only." "Every passenger train will have a bell cord attached to the bell in the cab of the engine passing through the entire train and secured to the rear end of the last car, and they will have a red light on rear platform of last car, and they will have a red light on rear platform of last car between sunset and sunrise. All other trains will have a red flag on each side of the last car in day time, and a red light on each side and one in the center of last car of train at night." (R. 48).

This was construed by employees to be between sunset and sunsire. (See evidence of Stone and other witnesses).

Verney, a witness for the railway company, the engineer who had charge of the train collided with, testified as to the meaning of having train "under control"; "I have been running an engine between five and six years. As to going into a station with your engine under control, speed is only one o fthe conditions which are necessary to take into consideration. I would consider that six or eight miles an hour, or ten miles an hour, as being under control at that place." (R. 70).

As to the state of darkness, every trainman at Thurber Junction had train lights out, except the train collided with, and all trainmen were using their lanterns at and before the time of the collision. We will quote some of the testimony from witnesses from the railfway company. Verney said his train stopped at place of collision at 7:33; Barger, his rear brakeman, said: "The first thing I did when I got there was to light Mr. Nichols' lamp and give it to him." (R. 74). Mr. Nichols was conductor, and took his lighted lantern from Barger, on the arrival of the train, and went to the office to register. (R. 75).

Mr. Verney testified: "Yes, it is true that the headlight on Youngblood's train—the train on the sidetrack—was lighted. The tail lights were burning on the train just ahead of me." (R. 69).

Andrews, brakeman on train standing on track anead of Verney's train, witness for railway, testified: "I put my lights out before Youngblood cleared the east "Y" for the engine to come in there. Yes, I was carrying my lighted lantern: I don't know whether I was carrying my lighted lantern before the wreck or not." (R. 82).

The photographs, plats and evidence of Prator and others shows that the collision occurred in a low, narrow valley, down grade, coming in and up grade going out,

with hills or mountains to the rear, and on either side. elevations with heavy timber and the village and hills in front, and those on the engine did not have skylight on the train in front.

It is not deemed necessary to set out in this brief any of the evidence relating to tests made on the ground afterwards; as they could have but little, if any, value as evidence. However, we call the Court's attention to the fact that the tests made on May 2nd, 1909, was in a clear, bright, moonlight night, and notwithstanding that, train lights were out, and lanterns being used, as early as 7:30 p. m., twenty minutes or more before the collision on the 2nd of May, 1908, (See Boykin's evidence, (R. 85).

ARGUMENT.

May It Please the Court:

The foregoing are the main facts in evidence before the jury, authorizing it to find that Prator had his train under control, that he used reasonable care to discover an object ahead of his train on the track, and that his train collided with the other train because it was too dark for him to see it in time, and the curve in the track was such as to prevent him from seeing it in time to avoid a collision with the other train, and that those whose duty it was to light the other train, was guilty of gross negligence in not doing so.

We will briefly argue the propositions included in the above sentence.

Did Prator have his train under control, as he approached the point of collision. The rule in evidence requiring engineers to have their trains under control, in passing through yard limits, is too indefinite to be understood, without an understanding of other rules for the guidance of engineers, and the custom of engineers in operating their trains, under that, and all other rules

furnished them for their observance in operating their trains. In other words, all such rules must necessarily be construed together, and be taken as a whole.

The trainmen who testified in the case and on that point, without exception said, that having the engine under control meant to have it going at such rate of speed that the engineer could stop same on the observance of the danger signal or sign, on the track ahead, or on being flagged a reasonable distance from the object on the track. And here permit us to refer to another part of the rule, viz.: "Expecting to find a train on the track at water stations or within yard limits, at any time." Now bear in mind, the rule requiring red lights to be on the rear of all trains, in the night time (and after dark would certainly be in the night time). Now also bear in mind, then, that every trainman, whether put on the witness stand by Prator or the railway company, testified that they would have expected the red lights to be on Verney's train, if it was in fact dark at the time. Then we have the rule to mean, so far as a train on the track is concerned, that the engineer, in running his train through yard limits, must have his train under such control, after dark, that he can stop same, in time to avoid a collision with a train discovered by him or his fireman, on the track ahead of him, with its signal lights out as required by the rules of the company. This is the rule as construed by trainmen in the railway company's service for many years, and we dare say that such construction made the rule, and that the railway company was bound by the construction put upon such printed rule by those in the service acting under such rule or rules, and if it had wanted its servants to have the train under such control, as to be able to stop same before running into a train or flat car out on the main line away from any regular stopping place without protection by signal lights, it was its duty to so amend the rule, so that its engineers and trainmen might know what to expect. Now, with these

views, supported by the evidence of all the trainmen who testified, did Prator have his train under control? He said it was drifting at the rate of six or eight miles an hour when his fireman gave the alarm, and that he had it under control. Smart, the conductor, said it was running between five and seven miles an hour, at that time, and that it was his duty as conductor to look after the speed of the train, and that such speed was satisfactory to him, and that a train running at such rate of speed would be under control. Stone, a brakeman on Prator's train, says: "When we first discovered the caboose, we were running possibly six miles an hour." When the air went on as testified to by Prator.

The witness, Youngblood, said six miles an hour would be under control, and Mr. Verney, one of the main witnesses for the defendant, said: "I would consider that six or eight miles an hour, or ten miles an hour, as being under control, at that place."

Dick Weisen, an engineer in the service of the railway for eighteen years, over the same track, said: "I stated that the yard limit board was put there to caution us to put out trains under control, expecting to find a train on the main line, if it was dark, I would expect some red lights to be on the rear of the train." (R. 32).

As to being "under control" he said: "After you pass over the trestle and approach on up to the switch, I usually reduce my speed to about six or eight miles an hour." (R. 31). "The usual rate of speed we come over this track where the accident occurred is six to eight to ten miles an hour." (R. 32).

The jury, under the evidence, was authorized to find that Prator's engine was running not faster than five miles an hour, and that ten miles an hour would be "under control,' as meant by the rule.

We will not discuss the evidence of Barger and Mann,

the only witnesses whose evidence even tends to the contrary, as to the speed of the train, as we feel sure that this Court will recognize the right of the jury to wholly disregard their evidence and find on the great preponderance of the evidence of other witnesses, that Prator had his train under control.

Did Mr. Prator use proper care to discover the train on the track ahead of him, in time to avoid a collision? We say, if human evidence is to be credited, he did use such care. The jury was justified in believing from the evidence that it was in a low, dark place, a cloudy, dark evening, in the dark of the moon, as shown by the calendar, of which this Court will take judicial notice, and that it was from thirty to forty-four minutes after sundown, and that it was dark at the time and place of collision. Prator and all his witnesses said it was dark, and all the circumstances show that it was dark. All train lights on other trains had been in place for some time, the Verney train alone being standing there in the dark. And every witness who tried to testify that it was not dark, admitted that other trains were lighted, and some of them, that they themselves, were going about their work using their lighted lanterns. And even Barger, the rear brakeman on the train collided with, whose duty it was to put out lights, on the train, admitted that he had given a lighted lantern to his conductor, on the arrival of the train at that place, which the evidence shows was seventeen minutes or more, before the collision. (Boykin's evidence shows that the sun set there at 7:14, and Smart and Stone put the time of the collision at from 7:50 to 7:55 p. m).

Did Prator keep a proper lookout for obstructions ahead, and did his fireman, Smith, as far as Prator knew, do likewise? Prator testified that on entering the yards, he slowed his train down, and leaned his head out of the side window of the cab, and looked ahead, as far as he could see, on the track for the curve, until it be-

came necessary to whistle for the station, a duty required of him; that he then withdrew his eyes from the track ahead, which was necessary, reached for his whistle cord, after looking to see that Smith, his fireman, was looking ahead, and at that moment Smith gave the alarm. He then threw his head to the south side of the cab, saw a headlight shining on the corner of the caboose, thirty-five or forty feet ahead of his engine, slapped on the air, and ran for his life. He says the train ahead could not be seen on account of the darkness, until the headlight of the engine came on to it as it swung around the curve, and that he, himself, could not have seen it any sooner, on account of the curve, if it had been daylight. Smith (an unwilling witness for Prator, as he admitted that he was trying to get back int othe service of the company) Prator's fireman, who was on the inside of the surve, and who could have seen the caboose, he says, at least 300 feet before he discovered it, if it had not been dark, or if it had been lighted, says that he was looking out ahead, all he could, to see if th track was clear; that he did not discover the caboose until they were right close up to it, on account of the darkness, and because it had no lights out. That when the headlight came around on to the corner of the caboose he saw it for the first time; and at once gave the alarm. Stone and Adkins were in the caboose, some fifty or sixty feet to the rear, and Adkins being more particularly on the watch, gave the alarm at identically the same time, that is when the headlight came on to the caboose. Stone and Smart, the conductor, looked out and saw it just as Prator did, and Smart reached to put the air on, as he could do as well as the engineer, and at that moment felt the air go on; Smart and Stone and Smith all saw train lights in the yards ahead of the train collided with, and men using their lanterns, and if lights had been on the train in question, they could have seen them 500 yards back on the track. Adkins was not used as a witness, and it is not strange that the railway company, out of four train crews there

on the ground when the collision occurred, could only use three men, Barger, Verney and Andrews? And now they want the Court to set aside the verdict of the jury, simply on presumption, or theories raised by the evidence of men who went there on a bright, moonlight night, to see how far they could see a caboose, when they knew that the caboose was there for the purpose of being seen.

Even if these men told the truth, the jury would still be authorized to find for Prator, but there was certain things in their evidence that raised grave doubts of its truth. And was not the jury the sole judge of their credibility? It seems that one Brooks Baker could read a newspaper there, on that bright, moonlight, at 7:40. Now, why did not someone else, out of that bunch of six or eight men also read?

Again, two or three of them testified that they could separate the daylight from the moonlight, and tell which was which. As to the blue print and the curve in the track Prator was corroborated by the photographs and other witness as to the curve. Youngblood says the engineer from his side could only see about two rail lengths ahead (about sixty feet) coming around that curve (R. 21). The railway company never used a trainman out of the hundreds in its service, as to how far an engineer could see ahead in rounding that curve. As to the blue print, Youngblood said that it looked too straight; that it did not speak the truth as to that curve. He says, "It seems to me that this is too straight. * * * This curve is not true." (R. 22). And again, "This looks straighter to me than the curve on the ground." (R. 22).

Now, let us place ourselves on Prator's train and view the matter as it actually was, as to him and his train crew. They were approaching this station in the dark. They had had their train lights out for seventeen miles back. They saw train lights on a train over in the yards between the switches; they saw the headlight on Young-

blood's train, looking west on the passing-track, or west "Y." They saw brakemen giving signals about in the yards with their lighted lanterns. They were not expecting to see a train where Verney's train was, without having the train lights in the proper place. As to this Prator said: "I stated that I would expect to find a train standing on the main track at any time, but I would expect to find red lights on the caboose, or be flagged a reasonable distance. Either would have prevented the accident." (R. 51). And many other witnesses said the same. In fact, they ran into a trap, and is it any wonder that they did not discover this train until it was too late to avoid the collision?

It will be seen from the photographs and plats in evidence that the yard limit board was put up 1,490 or more feet west of any sign of "yards;" that the place of the collision was 850 feet west of any switch, and that there was but one track there, and no lights such as are usual in railway yards. In fact, the board was the only indication of "yards" anywhere near the collision point. Now if the railway company can escape liability by adopting such a rule as that relied upon in this case, as construed by its counsel, then there would be a long space of its track west of Thurber Junction and actual yards, where its employes would have no protection in the night time against the negligence of those who obstructed the main and only track with unlighted cars. But the road was not operated under any such arbitrary rule. The rule in practice, as shown by the great preponderance of the evidence, was, that an engineer in passing over the track at the point of collision, was to have his train, if it was after dark, under such control that he could stop same when he and his fireman discovered a train on the track ahead, with three lighted lanterns on the rear car. If this simple precaution had been taken by those in charge of Verney's train, this case would never have been heard of in Court, as there would have been no collision.

We do not deem it necessary to cite authorities, as the

law is so well settled that this court will only disturb a verdict in a fact cast, where there is no evidence to support a vital issue, that we regard it as a waste of time and labor to refer to decided cases.

Counsel for appellant appear to rely for a reversal on what we regard as a mere conflict of evidence, with the decided weight of same, if that were necessary, on appellee's side of the case, both as to facts and circumstances and the credibility of the witnesses. Take for instance the evidence of Barger, who testified for appellant in substance, that he came out of the caboose of the Verney train, signalling Prator with a lighted lantern and ran meeting his train trying to get him to stop, and that he was a car length in the rear of Prator's train when the collision occurred, which would have been something more than 100 feet. (R. 72). If he did what he claims to have done on the occasion in question, the Prator train running at the rate of speed, he claims, would have run several hundred feet, while his evidence showed that the train, when he claims to have first seen it, was but a short distance away, he describing the distance as about a "city block." (R. 74). Notice his evidence on that page. He says: "When I first saw this train coming it must have been a block away. I mean a city block. I then took my lantern and walked out on the platform; I swung it and he did not observe it, and I then started for him; I started toward him and then got out of the way. When he hit, I was about three car lengths from the caboose; I was about three car lengths from the caboose when he hit it; the train was running about 18 miles an hour when it passed me."

No wonder the jury believed Prator when he testified that he saw this man run out of the Verney caboose just before the collision, and that he never saw anyone signaling, as Barger testified. (R. 47), and none of the other witnesses saw anything of the kind.

Another example: Prator's fireman, Smith, who was

trying to get back into the service of the Company (R. 29) (and who had evidently gone back on Prator), tried to make it appear that he had seen the Verney caboose and given the alarm at a sufficient distance from same for Prator to have stopped his engine before the collision, but the circumstances testified to by Smith himself exactly corroborated Prator as to this matter. Smith says when he saw the end of the Verney caboose, (when the focus of the headlight went on it), that he "hollered" look out! we are going to hit something" and jumped off. "I jumped as soon as I could;" that he hit the ground, rolled, and got up and did not move from that place until the collision occurred, and that he was then about a car length in the rear of the Prator caboose. He says: "It" (the Prator caboose), "was possibly a car length ahead of me, maybe not so far, when the collision occurred. (R. 26, top of page). That exactly corroborated Prator, as the evidence showed that Prator's caboose was 30 odd feet long, the engine a little longer, and Prator says when Smith gave him the alarm that the front of his engine was 35 or 40 feet from the Verney caboose. Further touching Smith's credibility, he testified on the trial as to the darkness when the collision occurred, saying "it was about dusk." He had made a written statement prior to the trial, and when it was shown him he said: "It is my statement. I dictated that statement." In that statement he said it was "quite dark" when the collision occurred, and here is his explanation:

Q. What do you say now, having seen the statement, as to the condition of the light or darkness at the time of the collision?

A. I say the same thing, because I think the word means practically the same thing; "quite dark;" I say now it was about dusk: I think that would mean the same thing as "quite dark," or "dusk," probably. Sometimes in speaking of the light if it be dusk, I might say it was "quite dark;" when I say "quite dark" I mean about dusk.

That is what I mean, quite dark, or dusk. (R. 28). Comment of this matter is unnecessary.

Again: It appears very plainly throughout apppellant's brief that its counsel realizes that Prator's testimony, was sufficient to sustain the verdict, unless the entire evidence demonstrated that his testimony was absolutely false, and that it was so clearly demonstrated to be false as to take the question of his credibility away from the jury, and appellant's counsel claim that they have made such demonstration by experiments made by others on the scene of the collision and by "physical facts." There was not a physical fact before the jury, but only the testimony of the witnesses as to physical facts. This certainly did not destroy Prator's testimony and the testimony of other witnesses. One witness testified that he took some photographs on the ground, and that from the cab window of an engine, he took the photograph of a caboose standing where the Verney caboose is supposed to have stood, and that the end of the Verney caboose showed in the picture, the camera being 300 feet west of the collision. Appellant seems to think that that testimony was "physical facts" and destroyed Prator's testimony. They seem to forget that it was for the jury to say whether or not the witness told the truth as to the distance or as to the location of the caboose and whether it was at the same point of the Verney caboose, etc. To say the least, it would have looked better to the jury if appellant had invited Prator or somebody representing him, to be present when such tests were being made.

As to evidence of other experiments by appellant on the ground it is sufficient to say that the witnesses participating in such experiments merely testified to physical conditions tending to disprove the evidence of Prator and his witnesses as to such conditions, but certanly the jury had the right to pass upon that matter. It would be a novel doctrine, indeed, that one set of witnesses, testifying as to physical conditions, would destroy as a mat-

ter of law, the testimony of other witnesses on the same subject.

One more point and we are through. As to the rules in force, with reference to operating trains within yard limits and the construction placed upon same by appellee and his witnesses, as set forth in this brief, quoted from the record; the bulletin or order claimed to have been issued by J. W. Ward in April, 1903, is entitled to no consideration as evidence; that is, the jury had the right to disregard the same entirely and to find that the rules in force were such as claimed by appellee and that the Ward bulletin was never put in practice by appellant's employees. The bulletin reads as follows: (R. 72).

Big Springs, Texas, April 1, 1903.

BULLETIN.

All Conductors and Engineers:

This is to advise you that a yard limit board has been erected about fifteen hundred feet west of bridge 97, about one-half mile west of Thurber Junction.

All trains will approach this limit with trains under full control expecting to find other trains or engines occupying the main line, but all freight trains will not be expected to occupy this limit on the time of passenger trains without flagman being out the required distance.

Yours truly,

(Signed) J. W. WARD.

As to this rule, Prator testified (after being shown the bulletin): "I never saw this bulletin, testified to by Mr. Ward, until yesterday. I began working for the Texas & Pacific Railway Company in February, 1906; I never knew anything of this until yesterday. I had no other rules except those contained in the time table under which I operated." (R. 88). The agreement between counsel for Appellant and Appellee on the trial of the case, with reference to the rules in evidence (R. 89) shows that this bulletin, and the evidence concerning

same, rested upon the testimony of the witness Ward and the witness Prator and no other witnesses testified concerning same.

Bearing in mind that the burden of proof was on the railway to show contributory negligence upon the part of Prator, and even if that was not the law, it seems to us, that the verdict of the jury is supported by the great preponderance of the evidence, and we respectfully submit that the case should be affirmed.

C. C. PRATOR.

In pro prio persona and A. W. Gregg, for Defendant in error, C. C. Prator.